

Digital Rights Management (DRM) Australian Anti-Circumvention Law Sony PS2 Mod Chip Case

Professor Brian Fitzgerald
QUT Law School

QUT

Queensland University of Technology

CRICOS No. 000213J

Australian Anti-Circumvention Law

Sony PS2 Mod Chip Case

QUT

Queensland University of Technology

CRICOS No. 000213J

Background: Sony PS2 Mod Chip Case

- *Kabushiki Kaisha Sony Computer Entertainment v Stevens* [2002] FCA 906 – www.austlii.edu.au
- Sony argued Stevens had breached s 116A *Copyright Act 1968* in that he had sold or distributed a circumvention device, namely mod chips. A circumvention device as defined in s 10 *Copyright Act*: *A device (including a computer program) having only a limited commercially significant purpose or use, or no such purpose or use, other than the circumvention, or facilitating the circumvention, of an technological protection measure.*

Technology

- The PlayStation is coded (through what is called Regional Access Coding (RAC) contained within a track on each CD read by a chip known as a “Boot ROM” located on the circuit board of the PlayStation console (hereafter called “RAC/Boot Rom”)) to play games available in the region in which the PlayStation was sold. This means that a game purchased in the USA or Japan cannot be played on a PlayStation purchased in Australia; the platform will not support it. As well a copied, burnt or unauthorised version of a game will not play on the PlayStation, as the copying process does not embed the necessary coding in the copy.



Legislation

- A technological protection measure (TPM) is defined under s 10 (1) *Copyright Act* as:
- *A device or product, or a component incorporated into a process, that is designed, in the ordinary course of its operation, to prevent or inhibit the infringement of copyright in a work or other subject-matter by either or both of the following means:*
- *(a) by ensuring that access to the work or other subject matter is available solely by use of an access code or process (including decryption, unscrambling or other transformation of the work or other subject-matter) with the authority of the owner or exclusive licensee of the copyright;*
(b) through a copy control mechanism.

Sony Case: First Decision

- Justice Sackville held that Regional Access Coding (RAC) was not a technological protection measure because it did not and was not designed to prevent access to the copyright content or to act as a copy control mechanism of the copyright content. The crucial finding being that RAC did not prevent reproduction of a game, it only prevented user of a game that was not coded for the region in which the PlayStation was sold: paras 92,118. Therefore, the mod chip could not be a circumvention device because it was not designed for the purpose of circumventing a technological protection measure.

Sony Case: Practical Effect

- Justice Sackville rejected the argument that RAC had the “practical effect” of inhibiting or preventing access or copying in that it created a disincentive for copying by making it difficult for copied games to be played.

Sony Case: RAM Argument

- The more complex argument made by Sony was that RAC was a TPM because it prevented copies of the games being made in the RAM (Random Access Memory) or temporary memory of the PlayStation console: para 119 ff.. The Judge rejected this argument predominantly on the basis that reproduction in RAM was of such a limited and temporary nature that it was not reproduction “in a material form” as required by the s 31 (1) (a) (i) *Copyright Act*.

Sony Case: Principle

- This case along with *Australian Video Retailers Association v Warner Home Video Pty Ltd* (2001) 52 IPR 242 at 262-3 evidence a clear principle suggesting that reproduction of a computer program in RAM will not be regarded as an infringing reproduction for the purposes of the *Copyright Act* unless it is reproduced in a manner and on a technology that will allow that temporary reproduction to be captured and further reproduced: paras 137, 147-8, 150. The message being that “use/playing” of a computer game is not of itself an infringement under the *Copyright Act*. Note AUSFTA changes – infringing material.

Sony Case: On Appeal

- On 30 July 2003, the Full Federal Court of Australia (French, Lindgren and Finkelstein JJ) overturned the decision of Sackville J at first instance, and held that the sale and distribution of PlayStation mod chips contravened s116A of the *Copyright Act*. The Court held that Regional Access Coding (RAC) embedded on PlayStation Games and activated by the Boot Rom chip on the circuit board of the PlayStation console was a technological protection measure for the purposes of s 116A *Copyright Act* even though it did not prevent copying as such but merely provided a disincentive for copying or burning games – the so called “practical effect argument”.
- *Kabushiki Kaisha Sony Computer Entertainment v Stevens* [2003] FCAFC 157
- High Court – Feb 8, 2005



Submissions to the High Court

- Statutory Interpretation – “prevent or inhibit”
- Right to modify property we buy and play lawfully acquired accessories
- Are back up copies lawful?
- Fit with amendments to parallel importation laws
- Pro-competition arguments
- Unjust acquisition
- Digital Liberty and Diversity: Digital Constitutionalism

