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Circumvention device - "technological protection measure" - "PlayStation" games on CD-ROMs

Kabushiki Kaisha Sony Computer Entertainment v Stevens [2003] FCAFC 157 (French, Lindgren and Finkelstein JJ, 30 July 2003)

This case has a narrow focus however it is of great import to the copyright interests in the entertainment industry. It is of interest that the Full Court was prepared to give a wider interpretation to the relevant provision of the *Copyright Amendment (Digital Agenda) Act 2000*.

The case attracted particular comment in the Digital Agenda Review – Circumvention Devices and services, Technological Protection Measures and Rights Management Information, Issues Paper prepared by Phillips Fox, Solicitors, as part of an independent research and analysis of the *Copyright Amendment (Digital Agenda) Act 2000*, commissioned by the Commonwealth Attorney General’s Department.

Background

The respondent (Mr Stevens), sold and supplied unauthorised copies of CD-ROMs containing computer games for use on PlayStation consoles manufactured and distributed by Kabushiki Kaisha Sony Computer Entertainment and its subsidiaries (Sony).

In order the for the CD ROMs to work on the PlayStation unit, Mr Stevens sold and installed in PlayStation consoles, programmed computer chips designed to override the console's internal operating system. Such chips were known as "mod chips".

Mod chips were needed because the CD-ROMs manufactured by Sony contained an access code that could not be reproduced by conventional CD recording or copying devices known as CD-ROM "burners". The CD-ROM inserted into a PlayStation console did not operate the console unless the access code on it had been read by a chip located in the console, known as a Boot ROM. The unauthorised copy of a Sony PlayStation CD did not replicate the access code and therefore the Boot ROM of the console denied it access.

The relevant law

Section s. 116A of the Copyright Act 1968 concerned actions in relation to circumvention devices and electronic rights management information. In general terms relevant to this matter, s. 116A applied if Mr Stevens was selling a circumvention device. The following terms were defined in the Copyright Act:

- “‘Circumvention device’ means 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.”
- “‘technological protection measure’ means 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.”

The proceeding

Sony instituted proceedings in which they alleged *inter alia* that Mr Stevens contravened the provisions of s. 116A of the *Copyright Act* (Cth) 1968 (the Act).

The issue

Sony argued that Mr Stevens supplied and installed mod chips in Sony PlayStations, which involved him in selling or offering to sell *circumvention devices* capable of circumventing *technological protection measures*, being the access codes and Boot ROMs;

The primary judge

The primary judge held that it did not. His Honour held that the definition required that in order to be a technological protection measure, a device must be designed to *prevent* or *inhibit* post-access infringement of copyright.

His Honour concluded that the Sony device only deterred or discouraged infringement of copyright in the computer games by rendering unauthorised copies unplayable. It did not "prevent or inhibit" infringement by reproduction of the CD-ROMs.

Decision

The Full Court held unanimously that the broader construction of the definition of "technological protection measure" was to be made. The Court decided that it was sufficient that Sony's device inhibited infringement by rendering the unauthorised copies unusable, notwithstanding that the protective device, by its own processes or mechanisms, was not capable of physically preventing an infringement from occurring.

The Court considered that as a practical matter, the access codes removed the incentive for persons to infringe. It followed that the definition of "technological protection measure" was intended to embrace an inhibition, in the sense of deterrence or discouragement of infringement, which resulted from a denial of access to a programme copied in infringement of copyright.

Accordingly, the appeal was allowed.