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## Article for Copyright World

### *Anti-circumvention case*

Helen Dakin, Australian Copyright Council, 20 August 2002

The Federal Court recently handed down its decision in *Sony v Stevens*, the first Australian case concerning the interpretation and application of the anti-circumvention provisions in the Australian Copyright Act, introduced with effect from 3 March 2001. The decision provides authority on the meaning of a “work”, a “technological protection measure” (TPM), and reproduction in “material form” in the context of digital material.

Sony’s Playstation consoles require different access codes in different geographical regions. Computer games played on the consoles are manufactured under licence and incorporate encrypted access codes that prevent consoles in one region playing games purchased in another region. Mr Stevens had supplied and installed “mod chips” that enable Playstation consoles purchased in Australia to play video games imported from other regions. He had also supplied unauthorised copies of Playstation games.

The Court accepted Sony’s argument that its trademarks had been infringed in relation to the unauthorised copies of its games, but rejected arguments based on copyright and fair trading legislation. The major part of the judgment concerned the construction and application of the anti-circumvention provisions.

#### **Works**

The Court followed the decision in *Australian Video Retailers Association v Warner Home Video* (2001) 52 IPR 242 (“AVRA v Warner”, mentioned in the February 2002 issue of *Copyright World*) and held that the computer programs stored in the CD-ROMS, consisting of instructions allowing the games to be played, were protected.

However, the Court held that the encrypted access code itself was not protected as part of the program, since it was not an integral part of the instructions enabling the consumer to have the experience of playing the game. The Court decided not to deal with the possible argument that the definition of “computer program” might cover an encrypted sequence of characters “merely because the sequence plays a part in permitting a computer to process a discrete set of instructions.”

#### **Technological protection measures**

The Court took a narrower view of the legislative definition of TPM than was argued for by the plaintiffs. It accepted that the purpose, and practical effect, of the access code system was to deter people from infringing Sony’s copyright by making,

importing or trading in unauthorised copies of Playstation games, but held that this general purpose of deterrence was not sufficient to make the access codes TPMs under the legislation.

The access control code on the Playstation games does not prevent, for example, copying of the games. The access code was designed to prevent the playing of games the copying of which onto the CD-ROM may or may not have infringed copyright.

The Court analysed the wording of the provisions and the legislative history in some detail and held that, in this context, the definition of a TPM is “confined to devices or products that utilise technological processes or mechanisms to prevent or curtail specific actions in relation to a work, which actions would otherwise infringe or facilitate infringement of copyright in that work.”

The judgment noted that there is no requirement that a TPM be designed exclusively to prevent or inhibit the infringement of copyright, but left open the question whether a device that incidentally achieved these aims could be covered by the definition.

### **Reproduction in material form**

The main remaining argument addressed the question whether the playing of an unlicensed game in a Playstation console involves reproduction of the program and is something that may be controlled by licence. Following *AVRA v Warner*, the Court held that the temporary reproduction of portions of the computer program in the Playstation RAM while playing the game is not a reproduction of a substantial part of the program in a material form, in the absence of a means of storing the information.

The Court considered the definition of “material form” as it applies to digital material. It concluded that under the Copyright Act a reproduction of a computer program is in material form only if the form in which the reproduction is stored is itself capable of further reproduction. For example, it was suggested that the access code might come within the definition of a TPM if the Playstation consoles were designed in such a way that the portion of the program stored in the RAM were capable of being reproduced.

*Kabushiki Kaisha Sony Computer Entertainment v Stevens* [2002] FCA 906 (26 July 2002) is available at [www.austlii.edu.au/au/cases/cth/federal\\_ct/2002/906.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/2002/906.html).