

Australian High Court Allows Chipping of Game Consoles

The Australian High Court has allowed an appeal¹ by Eddie Stevens who was previously found to have circumvented a technical protection measure in Sony's PlayStation console².

11 October 2005

The High Court considered that the PlayStation did not include a “technical protection measure”, as defined in the Australian Copyright Act 1968 (Cth) because it did not prevent any copyright infringement. It was considered that any infringement would have already occurred through burning a CD-ROM for play in the console, and the mod chip installed by Mr Stevens was used for a different purpose, ie subsequent play of the game. Based on the evidence submitted by Sony, it was not established that any infringement under the Act occurred merely by playing the game.

In overturning the Full Federal Court decision, the High Court accepted and reinstated the narrow construction of the technical protection measure provisions in Sackville J's initial decision³.

The provisions at issue in this case, however, have since been amended to expand the definition of “material form” so as to no longer require

that the form in which a work is reproduced must itself be capable of further reproduction⁴. Australia also has obligations under a Free Trade Agreement (FTA) with the US to amend the technical protection measure provisions by 1 January 2007 to expand their operation⁵. Sony's arguments concerning reproduction of a “cinematograph film” during play of the game were also dismissed largely on the basis of the evidence before Sackville J⁶.

Accordingly, whilst the High Court decision has allowed Mr Stevens to escape liability, the decision does not provide a green light for console chippers in Australia. Armed with the amendments to the provisions to comply with the FTA and better evidence concerning reproduction of works and other subject matter during play of the games, content owners, such as Sony, may still be able to use the provisions to find chippers liable.



Patents and Designs

END NOTES

¹Eddie Stevens v Kabushiki Kaisha Sony Computer Entertainment & Ors [2005] HCA 58, 6 October 2005.

²Kabushiki Kaisha Sony Computer Entertainment v Stevens [2003] FCAFC 157, 30 July 2003.

³Kabushiki Kaisha Sony Computer Entertainment v Stevens [2002] FCA 906, 26 July 2002.

⁴By the US Free Trade Agreement Implementation Act 2004 (Cth), Schedule 9, which commenced operation on 1 January 2005.

⁵Amendments must be made to the Copyright Act 1968 to ensure compliance with Article 17.4.7 of the Australian-United States Free Trade Agreement (AUSFTA). An Australian Government Committee is currently considering whether additional exemptions to liability under the technical protection measure provisions would be appropriate (<http://www.aph.gov.au/house/committee/laca/previnq.htm>).

⁶Supra, n1, para 98.

MORE INFORMATION

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For further information or advice on copyright or any other intellectual property matters please contact one of our offices on the numbers listed below.

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