

## The Playstation Mod Chip: A Technological Guarantee of the Digital Consumer's Liberty or Copyright Menace/Circumvention Device?

Professor Brian Fitzgerald - Head QUT Law School

(This article can be referenced to my website at: <http://www.law.qut.edu.au/about/staff/lstaff/fitzgerald.jsp> An earlier and shorter version of this paper appears in (2005) 10 *Media and Arts Law Review* 89)

“While Mr Samuel said he supported Sony’s right to crack down on the sale of pirated PlayStation games, he was critical of the fact that Australians now could not legally use games they had bought overseas, sometimes at lower prices than were available locally.” *Australian Financial Review* Friday 1st August 2003, p 24 – “ACCC attacks Sony victory”

The long running litigation between Sony and Sydney businessman Eddie Stevens is set to reach some degree of finality in the High Court of Australia later this year. It will be a landmark judgment that will have a significant impact on the rights of Australian consumers (of digital entertainment products) but will also fit into a global agenda on reconciling the rights of copyright owners and users. It is fair to suggest that like the *Gutnick* judgment<sup>1</sup> this decision will be noticed around the world and once again the High Court will be called on to show guidance and leadership on these issues.

### 1. Background<sup>2</sup>

Stevens was sued by Sony pursuant to the anti-circumvention provisions of the Copyright Act for modifying the Sony PlayStation 2 (PS2) computer games platform or console to allow it more functionality. Anti-circumvention law has been embedded into copyright law around the world and aims to stop people circumventing technological measures used to protect copyright.<sup>3</sup> It is a direct response to the fear that the digital networks of the Internet would mean of the death of copyright.

#### *The Technology*

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<sup>1</sup> *Dow Jones & Company Inc v Gutnick* [2002] HCA 56; B Fitzgerald, “*Dow Jones & Company Inc v Gutnick* [2002] HCA 56: Negotiating American Legal Hegemony in the Transnational World of Cyberspace” (2003) 27 *Melbourne University LR* 590; B. Fitzgerald, G. Middleton, A. Fitzgerald, *Jurisdiction and the Internet* (2004) Thomson/LBC Sydney

<sup>2</sup> B Fitzgerald, “The Mod Chip is not a Circumvention Device under Australian Copyright Law: *Kabushiki Kaisha Sony Computer Entertainment v Stevens* [2002] FCA 906” (2002) 6 *Southern Cross University Law Review* 354.

<sup>3</sup> Implementing art 11 *WIPO Copyright Treaty 1996* (WCT) and art 18 *WIPO Performers and Phonograms Treaty 1996* (WPPT). See further: *Universal City Studios Inc v Corley* 273 F.3d 429 (2nd Cir. 2001)

The Sony PlayStation is one of the most popular computer games consoles or platforms in the world. When a person wants to play a game they insert a disc into the PlayStation much like inserting a musical disc into a CD player. 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. As a consequence of consumers seeking greater choice of digital products or digital diversity<sup>4</sup>, a device known as the “mod chip” or “converter” surfaced in the market place. It extended the functionality of the PlayStation allowing games from other regions as well as copied, unauthorised or burnt games to be played on the PlayStation.

### *Sony’s Claims of Infringement*

Eddie Stevens was involved in the computer games industry in Sydney where it was alleged he sold unauthorised or copied Sony PlayStation games and also sold and/or supplied mod chips.

In particular Sony argued:

1. Stevens had engaged in **trademark infringement**: because on some of the unauthorised copies of the games that were sold by Stevens, the Sony trademark still appeared when the games were booted up in the PlayStation console. Sackville J at first instance was satisfied that on the evidence before him trademark infringement was established.<sup>5</sup>
2. Stevens was engaged in **misleading and deceptive conduct** under s 42 *Fair Trading Act 1987* (NSW). Sackville J held that this was not supported by the facts, as the people who purchased the unauthorised copies of the games knew that Stevens was not holding himself out as being endorsed by Sony to sell those games. People buying these games knew that the games were unauthorised copies.<sup>6</sup> This was not pursued on appeal.
3. Stevens had breached **s 116A of the Copyright Act 1968** in that he had sold or distributed a circumvention device, namely mod chips, which he knew or ought reasonably have known would be used as a circumvention device. A circumvention device as defined by the *Copyright Act*, is something that has little other purpose than to circumvent a technological protection measure (TPM). A technological protection measure is something that is designed to prevent access to, or copying of copyright subject matter. For instance, a password or access code making it possible to access copyright subject matter or a copy control mechanism. In this case the mod chips were alleged to have

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4 B. Fitzgerald, “Intellectual Property Rights in Digital Architecture (including Software): The Question of Digital Diversity?” [2001] *EIPR* 121

5 [2002] FCA 906 at [64-5]

6 [2002] FCA 906 at [73]

the purpose of circumventing Regional Access Coding - as activated by the Boot Rom - the technological protection measure.<sup>7</sup>

*The Digital Agenda Amendments: Anti-Circumvention Law*

This was the first case to consider the anti-circumvention law introduced by the *Copyright Amendment (Digital Agenda Act) 2000*. Section 116A *Copyright Act*, effective 4<sup>th</sup> March 2001, introduced the anti-circumvention notion enshrined in art 11 *WIPO Copyright Treaty* (1996) into Australian law. The section states:

*Subject to subsections (2), (3) and (4), this section applies if:*

- (a) a work or other subject-matter is protected by a technological protection measure; and*
- (b) a person does any of the following acts without the permission of the owner or exclusive licensee of the copyright in the work or other subject-matter:*
  - (i) makes a circumvention device capable of circumventing, or facilitating the circumvention of, the technological protection measure;*
  - (ii) sells, lets for hire, or by way of trade offers or exposes for sale or hire or otherwise promotes, advertises or markets such a circumvention device;*
  - (iii) distributes such a circumvention device for the purpose of trade, or for any other purpose that will affect prejudicially the owner of the copyright;*
  - (iv) exhibits such a circumvention device in public by way of trade;*
  - (v) imports such a circumvention device into Australia for the purpose of:*
    - (A) selling, letting for hire, or by way of trade offering or exposing for sale or hire or otherwise promoting, advertising or marketing, the device; or*
    - (B) distributing the device for the purpose of trade, or for any other purpose that will affect prejudicially the owner of the copyright; or*
    - (C) exhibiting the device in public by way of trade;*
  - (vi) makes such a circumvention device available online to an extent that will affect prejudicially the owner of the copyright;*
  - (vii) provides, or by way of trade promotes, advertises or markets, a circumvention service capable of circumventing, or facilitating the circumvention of, the technological protection measure; and*
  - (iv) the person knew, or ought reasonably to have known, that the device or service would be used to circumvent, or*

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7 [2002] FCA 906 at [24]

*facilitate the circumvention of, the technological protection measure.*

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.*

A **circumvention device** is also defined in s 10 (1) *Copyright Act* as:

*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.*

Section 116A (5) creates the civil cause of action against the infringer:

*If this section applies, the owner or exclusive licensee of the copyright may bring an action against the person.*

## **II. The Decision at First Instance**

*The First Instance Decision in the Federal Court on s 116A – RAC/Boot Rom is not a TPM and Therefore the Mod Chip is not a Circumvention Device*

At first instance Sackville J held that Regional Access Coding (RAC)/Boot Rom 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/Boot Rom did not prevent reproduction of a game, it only prevented use of a game that was not coded for the region in which the PlayStation was sold.<sup>8</sup> Therefore, the mod chip could not be a circumvention device because it was not designed for the purpose of circumventing a technological protection measure.<sup>9</sup> Sackville J rejected the argument that RAC/Boot

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8 [2002] FCA 906 at [92, 118]

9 cf. *Sony v Gamemasters* 87 F. Supp. 2d 976 (N.D. Cal. 1999); *Sony Computer Entertainment v Owen* [2002] EWHC 45; *Sony v Ball* [2004] EWHC 1738 (Ch); B Esler, “Judas or Messiah: The Implication of the Mod Chip Cases for Copyright in an Electronic Age” (2004) 1 *Hertfordshire L J* 1 [http://perseus.herts.ac.uk/uhinfolibrary/u20277\\_3.pdf](http://perseus.herts.ac.uk/uhinfolibrary/u20277_3.pdf)

Rom 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. He explained:

There seems to be nothing in the legislative history to support the view that a technological measure is to receive legal protection from circumvention devices if the only way in which the measure prevents or inhibits the infringement of copyright is by discouraging infringements of copyright which predate the attempt to gain access to the work or to copy it.<sup>10</sup>

However the Judge did comment that if RAC/Boot Rom were a TPM then the mod chip would have satisfied the definition of a circumvention device.<sup>11</sup> Further, Justice Sackville rejected a submission from the ACCC that in order for a device to be a “technological protection measure”, its sole purpose must be to prevent or inhibit infringement of copyright, noting that a TPM may have a dual purpose.<sup>12</sup>

The more complex argument made by Sony was that RAC/Boot Rom 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.<sup>13</sup> 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 s 31 (1) (a) (i) *Copyright Act*.<sup>14</sup>

Sony continued this line of reasoning and alleged that playing Playstation games created a copy of a cinematographic film in RAM. This argument was also rejected, explicitly on the ground that a substantial part of the film was not copied in RAM and implicitly because the film was not “embodied” in RAM.<sup>15</sup>

The reasoning of Sackville J in *Stevens* along with that of Emmett J of the Federal Court in *Australian Video Retailers Association v Warner Home Video Pty Ltd*<sup>16</sup> establish a principle 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.<sup>17</sup> The message being that

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10 [2002] FCA 906 at [117]

11 [2002] FCA 906 at [167]

12 [2002] FCA 906 at [104]

13 [2002] FCA 906 at [119 ff]

14 [2002] FCA 906 at [137]

<sup>15</sup> [2002] FCA 906 at [158]-[160]

16 (2001) 53 IPR 242 at 262-3

17 [2002] FCA 906 at [137, 147-8, 150] This position has now changed as a result of Article 17.4.1 of the Australia-US Free Trade Agreement which obliges Australia to enact laws giving copyright owners the right to prohibit all types of reproduction, in any manner or form, permanent or temporary. This change is implemented under the *US Free Trade Agreement Implementation Act 2004* (Cth) which came into effect on 1 January 2005. The Act amends the definition of ‘material form’ and ‘copy’ in section 10 of the Act and creates an exception to infringement where the reproduction is made as part of the technical process of using a non-infringing copy of the copyright material (see ss 43B and 111B). The critical difference being that temporary reproduction of a whole or substantial part of a computer program (game) or film (game) in RAM generated from an infringing copy of the copyright material will be unlawful.

“use/playing” of a computer game is not of itself an infringement under the *Copyright Act*. This seems to be the case regardless of whether a computer game is seen to be software under Part III of the *Copyright Act* or a cinematographic film under Part IV of the *Copyright Act*.<sup>18</sup>

Under Part III, the principle enunciated by Justice Sackville is reinforced by the express provision in s 47B, which allows certain temporary reproductions in the course of normal use of a computer program, although reproduction from an infringing copy of the program is not excused or exempted. Under Part IV, *Stevens* and *Warner*, suggest the principle of allowing temporary copying in RAM is to be implied solely as a matter of statutory interpretation of s 86(a) *Copyright Act*.<sup>19</sup>

It should be noted that the approach adopted by Sackville J prevents the content owner from using the temporary reproduction in RAM, which inevitably occurs when using a computer, as the basis of an action for copyright infringement.<sup>20</sup> The ability to take an action based on this temporary reproduction in RAM *per se*, would in essence allow copyright owners the right to control the use, reading or viewing of the digital material.<sup>21</sup>

### III. The Decision of the Appeal Court

*The Full Federal Court – RAC/Boot Rom is a TPM and the Mod Chip is a Circumvention Device*

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”.<sup>22</sup>

In the words of Lindgren J:

If, as in the present case, the owner of copyright in a computer program devises a technological measure which has the purpose of inhibiting infringement of that copyright, the legislature intended that measure to be protected (subject to any express exception), even though the inhibition is indirect and operates prior to the hypothetical attempt at access and the hypothetical operation of the circumvention device. By ensuring that access to

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18 *Galaxy Electronics Pty Ltd v Sega Enterprises Ltd* (1997) 75 FCR 81.

19 *Australian Video Retailers Association v Warner Home Video Pty Ltd* (2001) 53 IPR 242 at 254-5 cited in [2002] FCA 906 at [158]; *Stevens* [2002] FCA 906 at [158, 161]

<sup>20</sup> Amendments to the *Copyright Act* made pursuant to the AUSFTA will make this actionable where infringing copyright material is reproduced in RAM: see footnote 16.

21 J Litman, “The Exclusive Right to Read” (1994) 13 *Cardozo Arts & Ent. L. J.* 29.

<sup>22</sup> *Kabushiki Kaisha Sony Computer Entertainment v Stevens* [2003] FCAFC 157 at [20], [139], [189].

the program is not available except by use of the Boot ROM, or the access code embedded in the PlayStation games, or both in combination, Sony's measure does inhibit the infringement of copyright in the PlayStation games in that way.<sup>23</sup>

Likewise French J explained:

If a device such as an access code on a CD-ROM in conjunction with a Boot ROM in the PlayStation console renders the infringing copies of computer games useless, then it would prevent infringement by rendering the sale of the copy “impracticable or impossible by anticipatory action”.<sup>24</sup>

However in obiter the majority (French and Lindgren JJ, Finkelstein J dissenting) supported Sackville J’s holding that playing a PlayStation game and reproducing it temporarily in the Random Access Memory (RAM) of the PlayStation console did not amount to a reproduction in a material form for the purposes of the *Copyright Act*.<sup>25</sup> Once again in obiter the majority (French and Lindgren JJ, Finkelstein J dissenting) supporting Sackville J’s decision, apparently with slightly different reasoning, held that there is not a copy of cinematographic film made in RAM when a game is played, because there is no “embodiment in an article” as defined by ss 10 and 24 *Copyright Act*.<sup>26</sup>

#### *Statutory Interpretation*

Sackville J at first instance and French J on appeal approached the meaning of ‘technological protection measure’ by looking at the plain and clear words of the statute. Lindgren J (with whom Finkelstein J agreed on this point) on the other hand found ambiguity and devoted a significant amount of his judgment looking back at CLRC Reports, the Digital Agenda Discussion Paper, International Law, Exposure Drafts, Parliamentary Committee Reports and the Second Reading speech pursuant to s 15 *AB Acts Interpretation Act 1901* (Cth).<sup>27</sup>

### **The Issues Facing the High Court**

At the heart of what the High Court must decide is the growing concern that the liberty of citizens in the digital environment is being more heavily circumscribed than in real space in the name of copyright protection. The key issue will revolve around the interpretation of the statutory definition of ‘technological protection measure’ and the merit of the “practical effect argument”: that RAC/Boot Rom is a TPM because it has the practical effect of inhibiting infringement of copyright.

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23 Per Lindgren J at [139]

24 At [20];

25 At [168] [26]; cf [208-210]

26 At [181-3], [26]; cf. [222-4]

27 On statutory interpretation in the intellectual property context generally, see: *Network Ten Pty Limited v TCN Channel Nine Pty Limited* [2004] HCA 14

The more we explore the science of statutory interpretation the more we realise that it is not exact – is not a simple practice of literal understanding but a broader appreciation of “law in context”. From the works of Karl Llewellyn and Julius Stone on “leeways of choice”<sup>28</sup> through McHugh JA’s (as he then was) encapsulating statement of the modern approach in *Kingston v Keprose Pty Ltd*<sup>29</sup> to Kirby J’s recent pronouncements such as those in *Dossett v TKJ Nominees Pty Ltd*<sup>30</sup> we come to understand that in many instances two or more meanings of a statutory configuration of words may be possible. As Kirby J explains:

It is increasingly accepted that, in contested matters of statutory interpretation, there will often be persuasive arguments in favour of competing conclusions. In the end, a legal system endorses one interpretation as the correct or preferable construction. That is then identified as the only one applicable to the contested words. However, it is rare that words themselves, alone, yield the preferred outcome. If such disputes are to depend upon considerations more substantial than the identity of the decision-makers and their place in the judicial hierarchy, it is important that a court such as this should acknowledge the problematic nature of the task and seek to identify clearly the considerations that have led it to its conclusion. To say this does not mean delving into psychological considerations and other like mysteries. However, it does mean approaching the task of construction from a perspective that is broader than the examination of the words of the statute, armed with a dictionary or two. The importance of context for the derivation of meaning has been emphasised by this Court both in relation to statutory construction and the ascertainment of the meaning of private instruments. I approach the present appeal with that instruction in mind.<sup>31</sup> (footnotes omitted)

Likewise Gleeson CJ has stressed the role of context:

Meaning is always influenced, and sometimes controlled, by context. The context might include time, place, and any other circumstance that could rationally assist understanding of meaning<sup>32</sup>

The role of the Court has been further articulated by the Chief Justice as follows:

The concepts of meaning and intention are related, but distinct. It is not presently necessary to distinguish between construction and interpretation. The words are often used interchangeably. In the construction or interpretation of a

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<sup>28</sup> K Llewellyn *The Common Law Tradition* (1960) Little Brown, Boston; J Stone *Legal System and Lawyers’ Reasonings* (1968) Maitland Publications, Sydney ch 7; *Precedent and Law* (1985) Butterworths, Sydney Ch 4; *The Province and Function of Law* (1950) Maitland Publications, Sydney 171-89; A Macadam and John Pyke, *Judicial Reasoning and the Doctrine of Precedent in Australia* (1998) Butterworths, Sydney 53

<sup>29</sup> (1987) 11 NSWLR 404 at 421-4

<sup>30</sup> [2003] HCA 69 at [47] [49]

<sup>31</sup> *Ibid.* at [49]

<sup>32</sup> *Singh v Commonwealth of Australia* [2004] HCA 43 at [12]



statute, the object of a court is to ascertain, and give effect to, the will of Parliament. Courts commonly refer to the “intention of the legislature”. This has been described as a “very slippery phrase”, but it reflects the constitutional relationship between the legislature and the judiciary. Parliament itself uses the word “intention”, in the *Acts Interpretation Act 1901* (Cth), as a focal point for reference in construing its enactments. Certain words and phrases are said to have a certain meaning unless a contrary intention is manifested in a particular Act. Parliament manifests its intention by the use of language, and it is by determining the meaning of that language, in accordance with principles of construction established by the common law and statute, that courts give effect to the legislative will. This is a familiar judicial exercise.<sup>33</sup> (footnotes omitted)

As Kitto J said, references to intention must not divert attention from the text, for it is through the meaning of the text, understood in the light of background, purpose and object, and surrounding circumstances, that the legislature expresses its intention, and it is from the text, read in that light, that intention is inferred. The words “intention”, “contemplation”, “purpose”, and “design” are used routinely by courts in relation to the meaning of legislation. They are orthodox and legitimate terms of legal analysis, provided their objectivity is not overlooked.<sup>34</sup>

The modern approach to statutory interpretation is one that pays respect to the words of the statute but justifies meaning to the “interpretive community”<sup>35</sup> through a set of interpretive rules. The reason for legislating or purpose is dominant but this is in turn confined by notions of sensibility and fit along with respect for fundamental liberties yet parliamentary supremacy in the end must prevail in the instance of clear words subject to the overriding duty to uphold any constitutional imperative.

There seems to have been very little consideration of context and fit in the judicial reasoning of the Full Federal Court. Lindgren J spends a great deal of time ascertaining purpose yet does not afford much consideration to the context of the legislative provision. In my mind there are at least five arguments Stevens should make on appeal denying the legitimacy of the “practical effect” approach. All are based on rules of statutory interpretation.

**Rule I: “Consequences cannot alter statutes, but may help fix their meaning”<sup>36</sup>**

**Proposition 1: The approach of the Full Federal Court leads to the absurd consequence that a lawfully acquired piece of tangible property cannot be modified by a commercial provider of such services to allow “interoperability” or operation with lawfully acquired accessories. “You mean to say I cannot be supplied with new rims on my wheels on which to accommodate these wider and safer tyres?”**

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<sup>33</sup> *Wilson v Anderson* (2002) 213 CLR 401 at 417-419 [8]

<sup>34</sup> *Singh v Commonwealth of Australia* [2004] HCA 43 at [19]

<sup>35</sup> S. Fish, *Is There a Text in the Class* (1980) Harvard University Press Cambridge Mass.

<sup>36</sup> *Re Rouss* (1917) 116 NE 782 per Cardozo J at 785.

According to the Full Federal Court decision in *Sony v Stevens* a lawfully acquired PlayStation console (a chattel) cannot be modified by a commercial provider of modification services at the owner's request, in order to allow the machine to operate with a lawfully acquired accessory (such as PlayStation game purchased in the USA) or to view lawfully acquired content.<sup>37</sup> Except for safety considerations where else is our right to use/own private property (chattel) so severely restricted in the name of other property owners or citizens?<sup>38</sup> Zoning of real property is the only analogy.

The proper interpretation of this statute is that it operates in relation to content and not at the point of interoperability or co-operation of lawfully acquired assets. The approach of Justice Sackville reconciles this dilemma by rejecting the "practical effect" test which allows the copyright owner broad compass to reduce the functionality of the lawfully acquired PlayStation console. The purpose of the anti-circumvention provisions of the *Copyright Act* such as s 116A in implementing art 11 *WIPO Copyright Treaty 1996* (WCT) and art 18 *WIPO Performers and Phonograms Treaty 1996* (WPPT) is to preserve copyright in the digital environment. However to argue for an interpretation that would seriously encumber the lawful functionality of a chattel is a serious departure from the existing state of legal affairs. While proportionality<sup>39</sup> has never explicitly been a criterion of statutory interpretation one wonders if the caution of Cardozo J reproduced above in essence calls for an interpretation to be proportionate with context.

If contrary to the holding of Lindgren J, back up copies can be made of computer programs and there are very strong reasons for this counter argument, then the reasoning of the Full Court is extraordinary. It would mean a lawfully acquired games platform could not be modified to use or implement or operate a lawfully made spare or back up copy. This would be a ridiculous situation in which the copyright owner would control far beyond what they need or are entitled to.

The provisions in s 47C(1) *Copyright Act* allow for the making of a back up copy of a computer program if done by or on behalf of the owner or licensee of the copy from which the reproduction is made, primarily for the purpose of ensuring that the program may be used if the original copy is lost or damaged (see in particular s 47(1)(c)(ii)). The provisions do not apply if the back-up copy is made from an infringing copy of the program, if the owner of the copyright in the computer program has designed the program in a way that copies of it cannot be made without modifying the program or if the licence to use the program has expired.<sup>40</sup>

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<sup>37</sup> Sony could attempt to licence a game for use only within a territorial area. This would require characterisation of the consumer transaction as a licence not a (first) sale and also that competition/antitrust law did not invalidate the transaction.

<sup>38</sup> In relation to patented items there is an implied right to use, and repair and arguably modify, by a lawful purchaser of the patented item: *Solar Thompson Engineering v Barton* [1977] RPC 537; *Bottom Line Management Inc v Pan Man Inc* 228 F. 3d. 1352 (Fed. Cir. 2000); *Hewlett Packard Co v Repeat-O-Type Stencil Manufacturing Corp Inc* 123 F. 3d. 1445 (Fed. Cir. 1997); *Surfco Hawaii v. Fin Control Systems Pty, Ltd.* 264 F.3d 1062 (Fed. Cir. 2001)

<sup>39</sup> B Fitzgerald, "Proportionality and Australian Constitutionalism" (1993) 12 *University of Tasmania Law Review* 363; *Coleman v Power* [2004] HCA 39; B Fitzgerald, "Characterisation Proportionality and Constitutional Legislative Validity" (1995) (Unpublished manuscript).

<sup>40</sup> Section 47C(4). Nic Suzor has made the further point. "It may be argued that PlayStation 2 games, the Boot ROM and the RAC have been "designed [such] that copies [...] cannot be made without

However the words of Lindgren J in *Sony v Stevens*<sup>41</sup> have cast some doubt on the inherent right of a user to make a backup copy of a computer program under Section 47C. Following Jacob J's description of a similar submission in one of the leading English cases, *Sony v Edmunds* as "rather fanciful",<sup>42</sup> Lindgren J stated in *Sony* that:

It is difficult to conceive of the conditions referred to in subs 47C(1) or (2) ever being satisfied in the case of Sony PlayStation games. Implicit in the use of the word "licensee" in both subsections is a requirement that the making of the copy be permitted by the copyright owner. The making of a copy of a PlayStation game lies outside the licence granted by Sony. Subsections 116A(2)-(4) of the Act set out, by way of exception to subs 116A(1), purposes for which a circumvention device may be used. The purpose of making of back-up copies is not one of them. Finally, the CLRC Final Report stated (at 10.17): "The right to make a back-up copy should not extend to copies of computer programs that have been 'locked' by the copyright owner against the making of copies."<sup>43</sup>

This interpretation largely negatives the impact of the provision and makes the subjective intent of the copyright owner the paramount consideration. With respect this interpretation strays too far from the actual words of the section. Is Lindgren J suggesting that a consumer that becomes the owner of a copy of the program cannot make a back up copy unless the copyright owner agrees? Whether the consumer becomes the owner of a copy of the program is a question that must be determined on the evidence before the court including the nature of the consumer transaction.<sup>44</sup> The court would need to consider whether the consumer transaction of buying the game resulted in a sale of a copy of the program (not the copyright) or merely a licence of the copy. It is arguable that a consumer purchasing a Sony PlayStation 2 game becomes the owner of the copy of the program.

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modifying the program" (s47C(4)), with the result that back-up copies cannot be lawfully made. It is submitted that this argument cannot succeed unless the game itself needs to be modified to make a copy. In most cases, the game is not modified to make a back-up copy - it is directly copied from the original medium. The fact that the access code is not copied does not make the resulting copy a modified version of the original game - the game and the access code are separate works. Further, a requirement that something be done at a later time to another component in order to render a copied work useful is not the same act as the prior making of the copy. Section 47C(4) requires that a program not be modified in order to make a copy of it, but cannot be extended to a requirement that no machine that utilises the copy can be modified, nor should the explicit reference to a copy being made be read expansively to include acts that may occur after a copy is made." Email Correspondence 15/11/04

<sup>41</sup> *Kabushiki Kaisha Sony Computer Entertainment v Stevens* [2003] FCAFC 157 [40], [134] – [137]

<sup>42</sup> *Sony Computer Entertainment v Edmunds (t/as Channel Technology)* (2002) 55 IPR 429 at 432 per Jacob J. See also *Sony v Ball* [2004] EWHC 1738 (Ch).

<sup>43</sup> At [135-6].

<sup>44</sup> See further: *DSC v Pulse Communications Inc* 170 F.3d 1354 (Fed. Cir.1999); B Fitzgerald, "Commodifying and Transacting Informational Products Through Contractual Licences: The Challenge for Informational Constitutionalism" in CEF Rickett and GW Austin (eds), *Intellectual Property and the Common Law World*, Oxford, Hart Pub, 2000, 35; B Fitzgerald, "Commodifying and Transacting Informational Products through Contract" (2002) 20 *Copyright Reporter* 56; C Bartlett and B Fitzgerald, "Consuming Digital Entertainment: Key Legal Issues" forthcoming (2005).

Regardless of whether you are an owner of a copy or a licensee, s 47H would seem to suggest in prohibiting contractual ouster of the back up right, that the copyright owner cannot control the right of the owner or licensee of the copy to authorise a back up copy in the circumstances stipulated in s 47C.<sup>45</sup> At most it could be argued that “or” in s 47C means “and” and that the licensee must have permission of the owner of a copy, however even this seems to fit awkwardly with the intention of the section.

In short, what is being suggested (contrary to the holding of Lindgren J) is that s 47C on its face appears to allow back up copies of computer games acquired through a standard consumer transaction, where the owner of the copy of a game or licensee, not necessarily the copyright owner, approve. In other words, s 47C (reinforced by s 47H) presents as a guarantee of the digital consumer’s liberty/protection against the wishes of the copyright owner and any contractual or licence stipulation to the contrary. S 47C read as a consumer protection provision sensibly allows back up copies of expensive entertainment items where risk of damage is high. Why should the vulnerability of the medium - the CD or DVD - for presenting the entertainment be a condition of user or risk that must be born by the consumer when the real value of the commodity (what has been paid for) is the material stored on the disk? Furthermore the suggestion by Lindgren J that a circumvention device would be needed to make a back up copy is hard to accept as that copy can be made regardless of RAC nor does it acknowledge the consumer’s rights under the law as it existed at the time of this case to engage in actual circumvention.

It must be noted that there is no right to make backup copies in relation to cinematographic films. Therefore, the issue arises as to whether computer games, which have been deemed to be compositions of computer programs and cinematographic films<sup>46</sup> should be regarded as computer programs or films, remembering films on DVD have been held not to be computer programs.<sup>47</sup> The better view, reinforced by the approach of the judges in this case, is that computer games are computer programs for the purpose of s 47C.

In summary under the Full Federal Court approach the criterion of liability is the interoperability of platform and accessory when it should be the infringing of rights in the content. To hold otherwise gives the copyright owner enormous influence over the way in which lawfully acquired property can be used.

**Proposition 2: The approach of the Full Federal Court would mean that recent amendments to the *Copyright Act 1968* removing restrictions on the parallel importation of computer games – *Copyright Amendment (Parallel Importation) Act 2003* - would be made ineffectual and redundant as copyright owners can simply use Regional Access Coding reinforced by anti- circumvention law to segment markets through a technologically imposed restriction on parallel importation. “You say I can walk on the beach for free but interpret the law so as to allow beachfront land owners to fence off the dunes”**

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<sup>45</sup> B Esler, “Judas or Messiah: The Implication of the Mod Chip Cases for Copyright in an Electronic Age” (2004) 1 *Hertfordshire L J* 1 at 8-9 [http://perseus.herts.ac.uk/u/uhinfo/library/u20277\\_3.pdf](http://perseus.herts.ac.uk/u/uhinfo/library/u20277_3.pdf)

<sup>46</sup> *Kabushiki Kaisha Sony Computer Entertainment v Stevens* [2003] FCAFC 157 [62],[63]

<sup>47</sup> *Australian Video Retailers Association Ltd v Warner Home Video Pty Ltd* (2001) 114 FCR 324

If RAC is a TPM we have what Professor Lessig might call the operation of “code as law” – that is technology supplants legislation as the primary mode of regulating behaviour.<sup>48</sup> On the interpretation provided by the Full Federal Court parallel importation is in effect coded back into “law” thereby defeating the benefits of greater competition that the legislature had intended.<sup>49</sup> In repealing restrictions on parallel importation in 2003 the legislature could not have intended that these restrictions would be reinforced and reimposed through a technological measure given support by a statute enacted in 2001. Would it be so careless? The very great concern is that the approach of the Full Federal Court defines regional coding - a technological form of market segmentation - as a TPM thereby reducing cross market competition in copyright products, the very thing the Australian Parliament in 2003 said it wished to promote.<sup>50</sup> Once again this approach seems to fail the basic consequentialist test suggested by Carodozo J and restated above as calling for an “interpretation that is proportionate with context.”

And if we are mindful of allowing contract or private ordering to override the policy of copyright legislation – see the extensive report of the Copyright Law Review Committee *Copyright and Contract (2002)*<sup>51</sup> and s 47H of the *Copyright Act* - we must be alert to the same issues in relation to technology/code.<sup>52</sup> A consumer buying a computer game sold anywhere in the world would expect as an aspect of digital liberty that they should be able to use and view that game in Australia, a country where the legislature has deemed it good policy to be able to import copyright games without restriction.

In summary the point to be highlighted is that in sponsoring an interpretation that facilitates the technological segmentation of the market in digital entertainment products worldwide through limiting the ability of the consumer and lawful owner to make modifications to the games platform, when the legislature has acted to prevent this, is contrary to common sense. The mod chip is a technological bulwark of the liberty of digital consumers, yet to hold RAC is a TPM, gives an imprimatur and power to copyright owners to engage in conduct that will make markets for digital entertainment products less competitive and products more expensive for the consumer.

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<sup>48</sup> L Lessig, *Code and Other Laws of Cyberspace* (1999) Basic Books NY

<sup>49</sup> See Intellectual Property and Competition Review Committee, *Final Report* (2000) [www.ipcr.gov.au](http://www.ipcr.gov.au)

<sup>50</sup> *Senate Official Hansard*, No 16 2002, Second Reading Speech, *Copyright Amendment (Parallel Importation) Bill*, Senator Coonan, 10 December 2002 : “The central aim of the bill is to improve access to a wide range of software products and printed material on a fair, competitive basis by permitting the parallel importation of such goods. ... The bill offers the prospect of cheaper prices and increased availability of products for all Australians, but especially for small businesses, parents and the education sector.... Australian consumers and businesses will be able to get the best deal on legitimate printed material and software products.” See further: A Fitzgerald and B Fitzgerald *Intellectual Property in Principle* (2004) Thomson Sydney, pp 152-3

<sup>51</sup> Available at [www.clrc.gov.au](http://www.clrc.gov.au)

<sup>52</sup> As mentioned above the extent to which contract can be used to structure a user right or licence that limits use in a territorial district in the face of competition law is an interesting question that is yet to be fully tested.

**Rule 2 “It is settled law that a Court should not impute to a legislature an intention either to abolish or to modify a common law right or privilege unless the relevant legislation makes such an intention unambiguously clear”<sup>53</sup> – The *Coco* Rule**

**Proposition 3: The approach of the Full Federal Court ignores the principle enunciated throughout the history of the High Court that our common law liberty - “the common law rule [is] that “everybody is free to do anything, subject only to the provisions of the law”<sup>54</sup> – should not be construed to have been taken away unless the statute does this by clear words or necessary implication.**

The fundamental liberty here can be conceptualised in two ways. Firstly the right to enjoyment of private property – the PlayStation console and/or the game purchased in another region (or depending on the High Court’s approach possibly a back up copy) - recognised in the s 51 (31) *Constitution*, Art 17 *Universal Declaration of Human Rights* 1948 and the common law, has been taken away without clear words. The words making up the definition of technological protection measure do not by clear words or necessary implication<sup>55</sup> take away the fundamental liberty a person has to full enjoyment of their lawfully acquired property.

Secondly the principle of interoperability is fundamental to many things we do in life and is reinforced at various points in our legal system.<sup>56</sup> My right to choose what tyres I wish to have on my car and the ability to have different brands of tyre interoperate with my car is in a part a consequences of competition law. Likewise in copyright law in Australia<sup>57</sup>, the US<sup>58</sup> and Europe<sup>59</sup> the notion of allowing interoperability of

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<sup>53</sup> *Coco v Queen* (1994) 179 CLR 427 per Deane and Dawson JJ at [2]; see also Mason CJ, Brennan Gaudron and McHugh JJ [9]-[10]; *Baker v Campbell* (1983) 153 CLR 52 at 96, 116, and 123; *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 at 553 per Gleeson CJ, Gaudron Gummow and Hayne JJ; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492 [30]; *Coleman v Power* [2004] HCA 39 per Gummow and Hayne JJ at [185], per Kirby J at [250] – [251]; *Marquet* (2003) 78 ALJR 105 at 133 [160]; *Bropho v WA* (1990) 171 CLR 1 at 18 per Mason CJ Deane, Dawson, Toohey, Gaudron and McHugh JJ; *Potter v Minahan* (1908) 7 CLR 277 at 304; *Corporate Affairs v Yuill* (1991) 172 CLR 319; A MacAdam and T Smith, *Statutes* 3<sup>rd</sup>. ed. Butterworths Sydney, p 262; *A v Boulton* [2004] FCAFC 101; *Al-Kateb v Godwin* [2004] HCA 37 at [19] per Gleeson CJ, [193] per Kirby J, [241] per Hayne J; *Singh* at [19] per Gleeson CJ.

<sup>54</sup> *Coleman v Power* [2004] HCA 39 per Kirby J at [253] citing *Cunliffe* (1994) 182 CLR 272 at 363, *Lange* (1997) 189 CLR 520 at 564

<sup>55</sup> On this notion see: *A v Boulton* [2004] FCAFC 101

<sup>56</sup> On interoperability as a key principle of government IT policy see: AGIMO, *OSS Position Paper* 31 August 2004 <<http://www.agimo.gov.au/infrastructure/oss>> ; Australian Government, *Interoperability: Technical Framework for the Australian Government* (June 2003) [www.agimo.gov.au](http://www.agimo.gov.au)

<sup>57</sup> *Copyright Act* 1968 (Cth), s47D, as amended by *Copyright Amendment (Computer Programs) Act* 1999 (Cth); Anne Fitzgerald and Cristina Cifuentes “Pegging Out the Boundaries of Computer Software Copyright: The Computer Programs Act and the Digital Agenda Bill” in A Fitzgerald, B Fitzgerald, P Cook and C Cifuentes (eds) *Going Digital 2000: Legal Issues for E Commerce Software and the Internet* Prospect Media, Sydney, Australia (2000)

platform and product – largely for reasons of prospering competition and digital diversity - is facilitated by the various copyright laws allowing reproduction of software for the purpose of developing interoperable products.<sup>60</sup> Interoperability is a fundamental or core principle of the digital environment making up one of the handful of key principles of what I broadly term “digital constitutionalism”<sup>61</sup> of which digital liberty and digital diversity are subsets. The Dworkinian notion of a principle is of a broad based concept that mediates power relations and finds more precise embodiment in rules.<sup>62</sup> The approach of the Full Federal Court does not appear to be informed by any respect for this fundamental principle of interoperability. In fact the interpretation endorsed privileges the rights of the copyright owner at the expense of the notion of interoperability in the absence of clear words or necessary implication in the definition of technological protection measure. Nowhere does the notion of “inhibiting infringement” expressly or by necessary implication evince an intention to deny the interoperability of lawfully acquired products..

It is worthwhile to note that the Federal Circuit Court of Appeal when recently asked to interpret similar yet different legislation enacted in the US to implement Art 11 WCT as was s 116A *Copyright Act*, was at pains to point out that in enacting the DMCA, “Congress attempted to balance the legitimate interests of copyright owners with those of consumers of copyrighted products ...The DMCA does not create a new property right for copyright owners. Nor, for that matter, does it divest the public of the property rights that the Copyright Act has long granted to the public”.<sup>63</sup> In other words we must look very closely at any claim that anti-circumvention laws encumber the right to full enjoyment of lawfully acquired property in furtherance of the rights of copyright owners.

Further an amici curiae brief filed by US Intellectual Property Law Professors (convened by Professor Peter Jaszi) in *Davidson and Associates Inc v Internet Gateway Inc* (ED Missouri)<sup>64</sup> - a case currently on appeal to the 8<sup>th</sup> Circuit looking at the contractual ousting of reverse engineering rights in relation to software - argues that “privileges for reverse engineering are pro-consumer and pro-competitive. They help to assure that more and better products and services are available to consumers and to assure that copyright owners do not succeed in leveraging their limited rights into something that they were never intended to enjoy ....”<sup>65</sup> Similar arguments can and have been made here in relation to the mod chip. The amici curiae brief also highlights how arguments based on copyright misuse are being made in US courts in

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<sup>58</sup> *Sega Enterprises Ltd v Accolade, Inc.* 977 F. 2d 1510 (9<sup>th</sup> Cir. 1992); *Sony v Connectix*<sup>58</sup> 203 F. 3d 596 (9<sup>th</sup> Cir 2000); *Digital Millennium Copyright Act* 1998 (DMCA) s 1201 (f) (4)

<sup>59</sup> *Directive on the Legal Protection of Computer Programs* Directive 91/250 OJ 1991 L122/42, art 6

<sup>60</sup> B. Fitzgerald, “Intellectual Property Rights in Digital Architecture (including Software): The Question of Digital Diversity?” [2001] *EIPR* 121

<sup>61</sup> B Fitzgerald, “Software as Discourse: The Power of Intellectual Property in Digital Architecture” (2000) 18 *Cardozo Journal of Arts and Entertainment Law* 337 - Part IV - “Power and The New Constitutionalism” at 382-5; B Fitzgerald, “Digital Property: The Ultimate Boundary?” (2001) 7 *Roger Williams University Law Review* 47 at 143ff.

<sup>62</sup> R Dworkin, *Law's Empire* (1986) Fontana London; *Al-Kateb v Godwin* [2004] HCA 37 at f/n 64 and [69] per McHugh J.

<sup>63</sup> *The Chamberlain Group Inc v Skylink Technologies Inc* 381 F.3d 1178 at 1203, 1204 (Fed Cir. 2004)

<sup>64</sup> On the history of this case see: [http://www.eff.org/IP/Emulation/Blizzard\\_v\\_bnetd](http://www.eff.org/IP/Emulation/Blizzard_v_bnetd)

<sup>65</sup> Dated 21/2/04 - available at [http://www.eff.org/IP/Emulation/Blizzard\\_v\\_bnetd](http://www.eff.org/IP/Emulation/Blizzard_v_bnetd)

the face of claims that the exclusive rights of the copyright owner can override privileges held by consumers and citizens to facilitate diversity of thought, choice and life.<sup>66</sup>

**Rule 3 – “A judge-made rule is legitimate only when it can be effectively integrated into the mass of principles, rules and standards which constitute the common law and equity. A rule which will not "fit" into the general body of the established law cannot be the subject of judge-made law.”<sup>67</sup>**

**Proposition 4: The approach of the Full Federal Court does not fit with the existing body of principles within the Australian legal landscape.**

While McHugh J’s adoption of the Dworkian<sup>68</sup> “fit” principle is enunciated in the context of judicial law making of the common law (in the strong sense) there can be little doubt that statutory interpretation is also an act of judicial law making (in the weak sense) and must be guided by the interpretive rule requiring “fit”.<sup>69</sup> The interpretation of the Full Federal Court fits uneasily with recent amendments to the *Copyright Act* concerning parallel importation (as outlined above). An interpretation that reinforces anti-competitive technological market segmentation in the face of the Parliament’s wish to lift restrictions on parallel importation of copyright products like computer games is simply “no fit” with established principle.

One must also consider “fit” in the context of competition and consumer rights bestowed upon Australians by legislation such as the *Trade Practices Act 1974* and its state counterparts. Competition or antitrust law has long been sceptical of product tying wherein interoperability and market competition is reduced through tying an accessory to the core technology or platform.<sup>70</sup> In a sense only being able to utilise Australian sold Playstation games with an Australian sold platform ties or locks in the accessory to the platform with the very real potential of a decrease in interoperability and consumer welfare, as Australian consumers cannot utilise a cheaper and larger variety of games from the USA. Successfully asserting such an argument in court within the parameters of the existing law will be difficult,<sup>71</sup> however it is an argument (possibly amongst others) the High Court needs to weigh up in its reasoning especially in light of the fact that the legislature has moved to open up the international market in computer games. Ultimately the High Court will need to ask itself whether the interpretation it endorses facilitates conduct (e.g. regional coding

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<sup>66</sup> *Assessment Technologies of Wisconsin LLC v Wiredata Inc* 350 F. 3d. 640 (7<sup>th</sup> Cir. 2003); D. Burk, “Anticircumvention Misuse” (2003) 50 *U.C.L.A. L.Rev.* 1095

<sup>67</sup> *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 593 per McHugh J. See also *Al-Kateb v Godwin* [2004] HCA 37 at [69] per McHugh J.

<sup>68</sup> R Dworkin., *Law's Empire* (1986) Fontana London, at 228-239

<sup>69</sup> See further *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 143-4.

<sup>70</sup> S Corones, “[Technological Tying in the Computer Industry: When Does it Contravene s 46 of the Trade Practices Act?](http://www.law.qut.edu.au/about/ljj/editions/v3n1/corones.jsp)” (2003) 3 QUTLJJ <http://www.law.qut.edu.au/about/ljj/editions/v3n1/corones.jsp>

<sup>71</sup> Consider the responses of Mr Monti of the European Commission dated 14 June 2000 and 28 September 2000, to the questions of Glyn Ford (MEP) concerning regional coding, DVDs and competition <<http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/ce/103/ce10320010403en01380139.pdf>>



and segmenting markets) that contravenes the *Trade Practices Act*? That is a question of “fit”.

In terms of consumer law, it could be argued the notion that a good be suitable for the purpose for which it is sold – here to play lawfully acquired games – is ignored by the Full Court’s interpretation which allows the purpose of a consumer good to be determined by the needs of the copyright owner of an accessory to that good, rather than the needs of the consumer. This suggests the Full Court’s interpretation does not “fit” easily with basic elements of consumer law.

**Rule 4 - “The protection of intellectual property rights must be afforded in a constitutional setting which upholds other values of public good in a representative democracy.”<sup>72</sup>**

**Proposition 5 – It is unconstitutional to legislate intellectual property rights for the benefit of the copyright owner, that extinguish the power of the owner of a lawfully acquired chattel to modify it and use it as they wish.**

This proposition is based on either an inherent limit on intellectual property rights derived from core democratic principles or it finds support in s 51 (31) *Constitution*.

Many of these arguments are rehearsed in a slightly different form above. However what must be highlighted here is that the right to hold property is a fundamental principle of democratic existence. In essence a stable system of holding and recognising property entitlements is foundational to the workings of the Australian democratic system. The approach of the Full Federal Court ignores the pre-existing entitlements of the consumer who has lawfully acquired the PlayStation and the game accessory in favour of expanding the reach of the exclusive rights of the copyright owner. This is very much a loss/gain scenario – a form of unjust enrichment - that may well fall foul of s 51 (31).<sup>73</sup>

### **Emerging Principle : Reconciling Property Rights**

The US decisions in *Chamberlain*<sup>74</sup> (the garage door) and *Lexmark*<sup>75</sup> (the printer) highlight how much software is now embodied in daily life and more specifically the physical environment that we inhabit. If we can locate software in almost anything

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<sup>72</sup> *Grain Pool of WA v The Commonwealth* [2000] HCA 14 at f/n 218 per Kirby J

<sup>73</sup> B Fitzgerald, “Unjust Enrichment As A Principle of Australian Constitutionalism” (1995) available at <http://www.law.qut.edu.au/about/staff/lstaff/fitzgerald.jsp> ; B Fitzgerald, “Ownership as the Proximity or Privity Principle in Unjust Enrichment” (1995) 18 *University of Queensland Law Journal* 166; *Georgiadis v. AOTC* (1994) 179 CLR 297; *Mutual Pools & Staff Ltd. v. Commonwealth* (1994) 179 CLR. 155; *Health Insurance Commission v. Peverill* (1994) 179 CLR. 226; *Newcrest Mining (WA) Ltd. v. Commonwealth* (1997) 190 C.L.R. 513; *Smith v ANL* (2000) 204 CLR 493; *Air Services Australia v Canadian Airlines International Ltd* [1999] HCA 62

<sup>74</sup> *The Chamberlain Group Inc v Skylink Technologies Inc* 381 F.3d 1178 at 1203, 1204 (Fed Cir. 2004)

<sup>75</sup> *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522; 2004 U.S. App. LEXIS 27422 (6<sup>th</sup> Cir 2004)

that has mechanical operation then we have broad scope for the application of anti-circumvention laws as the copyright owner can code a TPM into the mechanical process. The worrying aspect of this occurrence is that a TPM may have more than one purpose and therefore could be used with the sanction of copyright law to limit user rights in a less than desirable manner, such as segmenting the international market for computer games.

While detailed legal reasoning prevented liability in the two US cases I would suggest a more fundamental principle is at play. Where a person owns tangible property – eg a printer, garage door or games console – they should have the right to use that property to its fullest enjoyment whether in buying generic garage door openers or printer cartridges or modifying it to play a wider variety of games from the US. More so, where a TPM is implicated in the process of user and one of the purposes of the TPM is motivated by an anti-competitive desire, the rights of the tangible property owner should be protected. If this does not occur the right to private property and the rationale for competition or antitrust law inherent in democratic society is severely undermined.

I would submit the following principle has emerged and should be used as a guide to the interpretation of anti-circumvention law:

*If the TPM has more than one purpose and*

- a) one of those purposes has an anti competitive effect and*
- b) there is a competing (vis a vis the exclusive rights of the copyright owner) right to use a lawfully acquired tangible item of property e.g. a garage door, printer or games console and*
- c) it is being argued that use of the lawfully acquired tangible item should be restricted on the basis of anti-circumvention law*

*then a court should be inclined, so far as interpretation of the law will allow, to reject the anti-circumvention claim.*<sup>76</sup>

While competition or anti-trust law is not constitutional law it is fundamental to the structure of our society and must be closely considered when determining the boundaries of digital property.<sup>77</sup> In this sense where the restriction of a person's enjoyment of their lawfully acquired property is motivated by anti-competitive desire we must closely scrutinise the attempt to further consolidate such a desire through anti-circumvention law.

## **Conclusion**

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<sup>76</sup> See an Italian decision (Court of Bolzano) on the legality of the mod chip, reinforcing this approach, at: <http://www.alcei.it/english/actions/psmodchip.htm> I acknowledge Olivier Oosterbaan for bringing this case to my attention. See also ACCC, "Submission to the Digital Agenda Review" (2003) at [http://www.phillipsfox.com/whats\\_on/Australia/DigitalAgenda/submissions/ACCC\\_submission.pdf](http://www.phillipsfox.com/whats_on/Australia/DigitalAgenda/submissions/ACCC_submission.pdf).

<sup>77</sup> B Fitzgerald, "Digital Property: The Ultimate Boundary?" (2001) 7 *Roger Williams University Law Review* 47

The decision of the Full Federal Court in *Kabushiki Kaisha Sony Computer Entertainment v Stevens* [2003] FCAFC 157 provides for an alarming alteration of consumer rights within Australia. Its effect is to say that a consumer cannot modify the capacity of a lawfully acquired machine (PS2) in order to use, read or play a lawfully acquired PS2 game. If we uphold such a principle from the outset we destine any mature notion of digital liberty (including diversity) to the proverbial dustbin.

The challenge is now set for the High Court to conceptualise and begin to map out the boundaries of digital liberty. At a general level, we must argue that our liberties in the digital environment should be no worse off than they are in real space.<sup>78</sup> As the foregoing explains basic interpretative principles (and potentially constitutional doctrine) dictate nothing less in this case.

\*This research has been undertaken pursuant to a QUT Strategic Collaborative Grant designed to enhance cross disciplinary research across the Faculties of Law, IT and Creative Industries. I owe thanks to: Alastair Macadam, Nic Suzor, Liam Chambers, John Pyke, Cheranne Bartlett, Fred von Lohmann, Quentin Cregan, Andrew Cameron, and Mark Byrne.

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<sup>78</sup> B Fitzgerald, "Is a Server a 'record'? *TLC Consulting v White* and Fundamental Rights in the Digital Environment" (2003) 10 *PLPR* 72