

Before the High Court

On Technology Locks and the Proper Scope of Digital Copyright Laws — *Sony* in the High Court

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Abstract

The High Court has granted special leave to appeal from the Full Federal Court's decision in *Kabushiki Kaisha Sony Computer Entertainment v Stevens*, a case which raises important issues concerning the application of copyright law to a digital environment, and the interpretation of those provisions in the *Copyright Amendment (Digital Agenda) Act* which introduced 'paracopyright' — laws which make it illegal to circumvent technologies used by copyright owners to control digital copies of their material. In this piece, Kimberlee Weatherall examines the case and its policy implications, and considers the various possible interpretations of the anti-circumvention provisions. She argues that, in light of the tortured legislative history of *Digital Agenda* amendments and current reviews, the unprecedented and expansive nature of these laws, and some of the comments about statutory interpretation in *The Panel* case, the High Court should take a cautious approach to interpreting these new laws.

1. Introduction

On 6 August 2004 the High Court granted special leave to Mr Stevens to appeal from a decision of the Full Federal Court, *Kabushiki Kaisha Sony Computer Entertainment v Stevens* (hereinafter *Sony*).¹ The case concerns the exceedingly popular Sony PlayStation system, and more specifically, the selling of 'mod chips' which are used to overcome technological measures employed by Sony to limit and control the use of PlayStation consoles. These technological measures allow owners of PlayStation consoles to play only authorised copies of Sony's games, and only those which are sold for use in the same geographical region where the console was bought. The 'mod chips' sold by the appellant allow the consoles to be used to play both infringing copies, and authorised copies sold in other regions.

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¹ (2003) 57 IPR 161. The transcript of the special leave application is available as *Stevens v Kabushiki Kaisha Sony Computer Entertainment & Ors* [2004] HCATrans 273, online at <<http://www.austlii.edu.au/au/other/HCATrans/2004/273.html>> (17 October 2004).

Sony is a case that arises under the *Copyright Act 1968* (Cth) (hereinafter *Copyright Act*).² But it is not about copyright as we traditionally know it. The questions that arise in *Sony* concern the interpretation and application of anti-circumvention laws, introduced around the world in the wake of the two Internet Treaties negotiated in the World Intellectual Property Organization (WIPO) in 1996.³ In Australia, anti-circumvention provisions were introduced after an extensive legislative process by the Commonwealth's *Copyright Amendment (Digital Agenda) Act 2000* (hereinafter the *Digital Agenda Act*).⁴

Anti-circumvention laws are directed against circumvention of the technological protection measures (TPMs) which copyright owners use to protect and control their copyright material in a digital environment.⁵ In light of the very rapid development of digital communication and reproduction technologies, copyright owners have sought 'the answer to the machine ... within the machine'.⁶ They are looking, increasingly, to use technological means — digital rights management or DRM — to prevent unconstrained, and uncompensated, copying and distribution of their valuable works. Encryption to prevent copying, encoded usage rules, and access limitations on digital content are examples. The problem for copyright owners is that any protective technology they are likely to come up with is equally likely to be 'cracked'. Someone will come up with 'electronic secateurs for cutting through the encryption'.⁷ Copyright owners have therefore sought, and obtained, laws against the manufacturers and traders of such secateurs.

2 Sony also sued Mr Stevens for infringement of trade mark under the *Trade Marks Act 1995* (Cth). These claims were successful at first instance and were not appealed: *Kabushiki Kaisha Sony Computer Entertainment v Stevens* (2001) 116 FCR 490. Sony also failed before Sackville J on claims for misleading and deceptive conduct under the *Fair Trading Act 1987* (NSW); these findings were also not appealed.

3 Two treaties were negotiated: the WIPO Copyright Treaty (WCT), and the WIPO Performances and Phonograms Treaty (WPPT). Both were aimed at updating copyright law to cope with the challenges posed by digital technologies and the Internet.

4 The relevant provisions are now found in Pt V, Div 2A of the *Copyright Act 1968* (Cth). On the consultation process, see below nn80–86 and accompanying text.

5 In Australia, the laws do not currently ban the act of circumvention; rather, they ban preparatory acts — broadly speaking, 'trafficking' in devices or services that enable circumvention. The absence of a proscription on circumvention was the result of a deliberate policy decision by the Australian Government. In many countries, anti-circumvention laws are more literally 'anti-circumvention' — they actually make it illegal to circumvent TPMs: see eg 17 USC §1201(a)(1)(A) (US) and *Copyright, Designs and Patents Act 1988* (UK) s296ZA, introduced by the *Copyright and Related Rights Regulations 2003* (UK). In Australia, the government made a policy decision *not* to ban the act of circumvention, on the basis that the real damage was done by the distribution of circumvention devices. This position will be reversed as a result of the Australia–United States Free Trade Agreement, 18 May 2004 [2004] ATNIA 5 (hereinafter AUSFTA) Art 17.4.7(a)(i).

6 Charles Clark, 'The Answer to the Machine is in the Machine' in P Bernt Hugenholtz (ed), *The Future of Copyright in a Digital Environment: Proceedings of the Royal Academy Colloquium* (1996) at 139.

7 William Cornish, *Intellectual Property: Omnipresent, Distracting, Irrelevant?* (2004) at 56.

Anti-circumvention laws have been highly controversial around the world,⁸ in part because the technological mechanisms they protect are not necessarily limited to enforcing the kinds of rights historically granted to and exercised by copyright owners. They can act as a kind of ‘supercopyright’, or ‘paracopyright’, enabling copyright owners to exercise far more fine-grained and extensive control. This has raised fears of ‘digital lockup’ and the loss of fair dealing and consumer rights. Just how *far* anti-circumvention laws end up conferring rights which extend beyond traditional copyright is one of the key issues the High Court will have to confront in *Sony*.

In granting special leave, the High Court has not only taken on the mantle, as it did in another case not long ago,⁹ of being the first court of ultimate appeal to consider difficult applications of legal principle to the digital communications environment. More controversially, the High Court has also thrust itself into the midst of an extremely heated debate on digital copyright, at a very interesting time. The anti-circumvention provisions have been ‘very much at the heart of recent “copyright wars”’.¹⁰ The provisions which will be considered by the High Court are currently subject to a government review.¹¹ The two key issues which the court will consider — what counts as a ‘copy’ in the digital environment, and what kind of TPMs are enforceable at law — are both affected by the Free Trade Agreement recently concluded with the United States (AUSFTA).¹² As a result of AUSFTA, the definition of ‘material form’ has already been amended,¹³ and the anti-circumvention provisions must be rewritten within the next two years.¹⁴

Digital copyright is in turmoil, and the actual legislative provisions on which the High Court will be deliberating are a moving target. Nevertheless, whatever result the court reaches is going to be very closely watched and widely reported, and the findings and comments of the court have the potential to add another

8 See further nn75–79 and accompanying text.

9 *Dow Jones & Company Inc v Gutnick* (2002) 202 CLR 575 (a case concerning jurisdiction over defamation committed online).

10 Jill McKeough, Andrew Stewart & Philip Griffith, *Intellectual Property in Australia* (3rd ed, 2004) at 265 [8.61].

11 The undertaking of a review was announced at the time the original legislation was passed: see Revised Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 2000 (Cth) 18. A report from the review process was recently released: Phillips Fox, *Digital Agenda Review, Report and Recommendations* (January 2004, released 28 April 2004). At the time of writing, the government was ‘considering the report as part of the broader review of the digital agenda reforms’: Commonwealth Attorney-General’s Department, ‘The AGD e-News on Copyright’ (2004) Issue 33: <http://www.ag.gov.au/agd/WWW/eneNewsCopyrightHome.nsf/Page/eNews_Issue_33_-_July_2004#4> (18 October 2004).

12 AUSFTA, above n5. This assumes, of course, that AUSFTA comes into force. This will occur 60 days after an exchange of diplomatic notes between the parties: *ibid*, Art 23.4.1. At the time of writing, the exchange of diplomatic notes between the parties had not been completed.

13 *US Free Trade Agreement Implementation Act 2004* (Cth), Sch 9 Item 186, amending the definition of ‘material form’ in s10(1) of the *Copyright Act 1968* (Cth). The new definition excludes the requirement that a copy be in a form from which the work ‘can be reproduced’.

14 AUSFTA, above n5, Art 17.12.

perhaps influential perspective on this ongoing, passionate debate about the future of digital copyright law.

In this brief article I will consider only one of the issues before the High Court: how to interpret the anti-circumvention provisions, and in particular, the definition of ‘technological protection measures’. I will argue that the history of the *Digital Agenda Act* argues in favour of a cautious approach by the High Court. The provisions the court will be required to consider were very fiercely contested, internationally and within Australia, and the final text of the provisions represents a heavily negotiated compromise. In this context, principles of statutory interpretation suggest that the court should be careful about applying the provisions to anything beyond those cases demonstrably intended to fall within their scope.

2. *The Sony Case: Facts and Findings*

A. *The Facts in Sony*

Companies in the Sony group (hereinafter Sony) manufacture and sell PlayStation consoles and PlayStation games embodied on CD-ROMs and capable of being played on those consoles. As part of its strategy in the manufacture and sale of PlayStation consoles and games, Sony adopted a system consisting of two parts:

- an ‘access code’ embodied in a track on each PlayStation game CD-ROM,¹⁵ and
- a ‘boot ROM’ chip located on the circuit board of the console.

When a CD-ROM embodying a PlayStation game is inserted into a PlayStation console, the boot ROM performs an electronic check to see whether it has the required access code. If the correct access code is not present, the PlayStation console will refuse to load and operate the game.

The access codes used by Sony protect and control the market for copyright games in two ways. First, when an unauthorised copy of a PlayStation game is made, at least on readily available devices such as ordinary CD-ROM copying devices (CD-burners), the access code is not reproduced. As a result, the burned copies will be rejected by PlayStation consoles. In this way, while not *directly* preventing infringement of copyright, it can be argued that the combination access-code/boot ROM mechanism ‘deters’ infringement, by ‘rendering the exercise pointless’.¹⁶

Second, the access code acts as a means of market control, or rather, market segmentation. Sony has divided the world market for PlayStation consoles and games into three broad ‘regions’, and applies *different* access codes to each of these regions. PlayStation consoles from one region will look for the access code for that region only. Hence, a person who purchases a console in Australia will not

15 Actually constituted by an encrypted string of characters: see *Kabushiki Kaisha Sony Computer Entertainment v Stevens* (2002) 55 IPR 497 at 508 [46].

16 *Kabushiki Kaisha Sony Computer Entertainment v Stevens* (2002), id at 506 [29]

be able to play even *authorised, non-infringing* copies of games purchased in the US: their Australian ‘boot ROM’ will search in vain for an Australian ‘access code’.¹⁷

Mr Stevens sold and installed ‘mod chips’. These mod chips overcome Sony’s protective mechanism, in effect instructing the console that the validity and territorial codes are acceptable for operation.¹⁸ Sony sued Mr Stevens under s116A of the *Copyright Act*. That section confers on a copyright owner or exclusive licensee a right of action where:

1. a work or other subject matter;
2. is protected by a TPM; and
3. a person;
4. without the permission of the owner or exclusive licensee of copyright in the work;
5. sells or distributes a circumvention device;
6. capable of circumventing or facilitating the circumvention of the TPM; and
7. the person knew or ought reasonably to have known that the device would be used to circumvent or facilitate the circumvention of the TPM.¹⁹

At trial, Sackville J found that on each Sony PlayStation game CD-ROM there was both a cinematograph film²⁰ and a computer program, and both were protected by an access code. His Honour also found that Mr Stevens was selling mod chips which he knew could be, and would be used to circumvent this access code.²¹ The real issue, at trial and in each appeal, is whether the mechanism applied by Sony — the access code and/or boot ROM, is a technological protection measure within the definition contained in s10(1) of the *Copyright Act*:

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,

17 *Kabushiki Kaisha Sony Computer Entertainment v Stevens* (2002), id at 508 [47]. The market segmentation implications are elaborated in a submission made by the Australian Competition and Consumer Commission (ACCC) in the course of the Digital Agenda Review referred to above n11. The submission is available at: <http://www.phillipsfox.com/whats_on/Australia/DigitalAgenda/DigitalAgenda.asp> (19 October 2004).

18 *Kabushiki Kaisha Sony Computer Entertainment v Stevens* (2002), above n15 at 509–510 [54].

19 This summary of the elements of the claim under s116A was set out by David Catterns QC and quoted by Lindgren J, *Sony*, above n1 at 179 [56].

20 A cinematograph film, defined in the *Copyright Act* s10(1) as ‘the aggregate of the visual images embodied in an article or thing so as to be capable ... of being shown as a moving picture’, is protected by copyright under s86. It has been recognised that this definition can cover computer games: *Galaxy Enterprises Pty Ltd v Sega Enterprises Ltd* (1997) 75 FCR 8.

21 Strictly speaking, because he found the mechanism used by Sony was not a TPM, Sackville J did not need to consider whether the mod chip was a circumvention device; he indicated, however, that he would have so found: *Kabushiki Kaisha Sony Computer Entertainment v Stevens* (2002), above n15 at 537 [167].

- 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.

Clearly, Sony's protective mechanism — the access code and/or boot ROM — is not a 'copy control mechanism', it is a mechanism for 'ensuring that access ... is available solely by use of an access code or process', within paragraph (a) of this definition. The question is, therefore, whether the Sony mechanism 'prevents or inhibits infringement'.

B. The Issues and Arguments

At the heart of the *Sony* dispute lies a quite fundamental ambiguity in the legislation: it is not at all clear when an *access* control device prevents or inhibits *infringement*.²² The answer to this question is by no means self-evident.²³ 'Access' is not, in itself, infringement of copyright. Infringement occurs through the doing of an act comprised in the copyright, without permission or defence.²⁴ And while it has been argued that the exclusive right to control access *should* be a right — or even *the* primary right — of the copyright owner in a digital environment,²⁵ the terms of our *Copyright Act* do not currently grant such a right.²⁶

Accepting that 'access' is not itself infringement, we need to identify some act, occurring before, after, or simultaneously with access, which is infringement and which is prevented, or inhibited by the TPM. Now, it seems evident that access controls which prevent or make more difficult *subsequent* infringing acts must be covered: a review of the debates on the *Digital Agenda Act* reveal that such access

22 This problem in the legislation was not suddenly 'discovered' when the *Sony* litigation began: Miranda Forsyth, 'The Digital Agenda Anti-circumvention Provisions: A Threat to Fair Use in Cyberspace' (2001) 12 *AIPJ* 82 at 93, noting that '[a]lthough this provision was subject to many amendments before its final form was decided upon, it remains problematic. In particular, it is not clear how a means which prevents access to a work can be designed to prevent or inhibit the infringement of copyright in a work because, as outlined above, merely accessing a work does not breach copyright in that work.'

23 Indeed, it is interesting to note that during the negotiations that led to the *Digital Agenda Act*, some copyright owners were arguing that there was no such thing as an access control which prevents or inhibits infringement of copyright: see Submission to House of Representatives Standing Committee on Legal and Constitutional Affairs, Commonwealth Parliament, 30 September 1999 (International Intellectual Property Alliance (IIPA)). The IIPA were very influential in the Standing Committee hearings; Steven Metalitz appeared extensively in the Committee hearings.

24 *Copyright Act* ss36, 101.

25 Jane Ginsburg, 'Essay: From Having Copies to Experiencing Works: The Development of an Access Right in US Copyright Law' (2003) 50 *J Copyright Soc'y USA* 113; David Lindsay, 'A Comparative Analysis of the Law relating to Technological Protection Measures' (2002) 20 *Copy Rep* 118 at 123.

26 Lindsay, *ibid*. Recent amendments to the *Copyright Act* as a result of the AUSFTA may have the effect of granting an 'access right' — particularly through the amendment of 'material form'. See Kimberlee Weatherall, 'Fudging the Question: the FTA and the future of digital copyright in Australia', paper given at the IPSANZ Conference, Noosa, 10–12 September 2004 at [3.3.1].

controls are, in fact, a clear case which the legislation was explicitly intended to cover. One example frequently given during those debates was an access control consisting of a device or process to limit access to an online database — for example, an access control mechanism requiring those seeking access to produce an appropriate technological ‘key’.²⁷ It was argued, during the debates, that the law should prevent the circumvention of technology designed to limit access to such a database, as someone who circumvents such protection will be in a position to download chapters, or articles, without paying the fees. In this example, infringement — the reproduction which occurs when chapters or articles are downloaded — is subsequent to, and made possible by the circumvention of the access controls.

The prevention of *subsequent* infringement, then, is the easy case, where the definition clearly applies. But Sony did not argue that its mechanism prevented that kind of subsequent infringement. Instead, Sony argued that its mechanism prevented *prior* infringement, and infringement, through mere use of the copyright material submitting that the access code and/or boot ROM:

1. by making the fruits of infringement unplayable, ‘inhibited’ *prior* infringement, by deterring it, or rendering it impracticable;
2. prevented a infringing use — ie the reproduction of a computer program in the temporary memory (‘random access memory’, or RAM) of the console, generated when an infringing CD-ROM was inserted. This argument depends on accepting that the temporary copy in RAM — a necessary part of use of the CD-ROM — is a reproduction ‘in material form’ as defined in s10;
3. prevented a infringing use — being the copy of the cinematograph film in the temporary memory of the console, made when an infringing CD-ROM was inserted in the console. This argument depends on accepting that the RAM is an ‘article’ in which a copy of a substantial part of the film is ‘embodied’.

Sony only needs to succeed on *one* of these theories to establish a breach of s116A. At trial, Sony failed on all three arguments. In the Full Court, Sony was successful in the first argument, but failed on the other two, because a majority of the Full Court did not accept that the instantiations in RAM were ‘reproductions’ or ‘copies’ within the meaning of the *Copyright Act*.²⁸ All three theories will need to be examined in the *Sony* appeal assuming, as foreshadowed in the special leave hearing, a notice of contention is filed.²⁹

27 Eg, see the comments of Mr McClelland MP in the final debates in the House of Representatives: Commonwealth of Australia, House of Representatives, *Parliamentary Debates (Hansard)*, 26 June 2000 at 18344. See also the comments of Mr Baird MP, Commonwealth of Australia, House of Representatives, *Parliamentary Debates (Hansard)*, 27 June 2000 at 18363. Mr Baird MP gave the example of ‘people [who] can hack into commercial databases and download a chapter or an article for study or research even if the copyright owner is making the work available for a fee. This is equivalent to theft and should be treated appropriately’.

28 Finkelstein J dissented on this part of the judgment, holding that the temporary copies *were* infringements: *Sony*, above n1 at 212–223.

29 *Stevens v Kabushiki Kaisha Sony Computer Entertainment*, above n1.

Note, however, that each of the arguments made by Sony requires broadening the application of the anti-circumvention provisions beyond the clear case of the example given above. The first argument requires us to accept a broad reading of ‘inhibit’, extending to infringements that occur before the technical mechanism ever actually operates. The second and third arguments go a long way towards accepting that copyright now gives copyright owners the exclusive right to control all access and every use of a copyright work, despite the absence of such an exclusive right from the provisions of the *Copyright Act* which define the copyright owner’s exclusive rights.³⁰ The ‘access right’ arises effectively by chance — because certain temporary copies happen to be made.

In a short piece, it is not possible to deal with all three of these arguments in detail. The second and third arguments depend on an issue of long standing in copyright law — namely, ‘which copies count’. I will not engage in this debate in detail, which has been considered elsewhere. Instead, I will focus for the remainder of this paper on the first of the three arguments, as it is this argument which requires us to interpret the new amendments made by the *Digital Agenda Act*, and delve a little into their tortured legislative history — something which has been less comprehensively dealt with in the existing Australian academic literature. I will then offer some thoughts on the proper approach to statutory interpretation in light of that history.

3. *Interpreting ‘Technological Protection Measure’*

As noted above, the first key issue for the High Court in *Sony* will be how to interpret the definition of TPM. With respect to French J,³¹ the only thing which is clear about the statutory definition of a TPM is its ambiguity.³² To borrow a phrase from a famous writer describing US copyright law, the provisions have a ‘maddeningly casual prolixity and imprecision’.³³ In resolving this ambiguity, and divining (or perhaps, retro-fitting) a meaning to the text, the High Court has at least three alternatives.

A. *The Available Alternatives*

(i) *The Mechanically Focused Approach of Sackville J*

One alternative would be for the High Court to reinstate the interpretation of the trial judge. According to Sackville J:

The definition is intended to be confined to devices or products that utilise technological processes or mechanisms to prevent or curtail specific actions in

³⁰ See above nn22–26 and accompanying text.

³¹ French J held that it was possible to interpret the definition by reference only to its ‘ordinary meaning’. That ordinary meaning, according to his Honour, was broad, and unconstrained by anything in the text, and ‘it is for the legislature to spell out the limiting words ... It is not for the court to cage the ordinary meaning of the words which have been adopted by reference to policy considerations of its own divining’: *Sony*, above n1 at 174.

³² *Sony*, above n1 at 186 [85] (Lindgren J).

³³ Benjamin Kaplan, *An Unhurried View of Copyright* (1967) at 40.

relation to a work, which actions would otherwise infringe or facilitate infringement of copyright in that work.³⁴

Another way of putting this would be to say that the definition is intended to cover access controls the circumvention of which either *is* infringement (in the sense that the same act which ‘circumvents’ also constitutes an infringement), or *puts the person circumventing in a position to infringe*. Sackville J justified his interpretation by relying on the nature of the definition, the ‘focus’ of which, he said, ‘is on a technological device or product that is designed to bring about a specified result ... by particular means’ — in other words, on the physical operation of the device, not its antecedent effects.

On Sackville J’s interpretation, Sony’s first argument failed, as it relied on the deterrence of prior infringement. It is worth noting however how well Sackville J’s interpretation of the definition covers the ‘clear case’ given above. A technological measure which limits access to an online database to those who possess the right key and password curtails an act — the act of ‘access’ — which would facilitate infringement subsequent to access — the downloading of chapters and articles. The mechanism thus is an *access control*, which *prevents* — or perhaps better, *inhibits*, since the process is indirect — infringement of copyright.

Sackville J’s interpretation would also cover another example given in the legislative history that preceded the *Digital Agenda Act* — the AutoCAD lock.³⁵ AutoCAD was an expensive computer program used to draft architectural and engineering plans. For the AutoCAD program to run, a physical device, the AutoCAD lock, had to be plugged into the computer. A key purpose of the AutoCAD lock was to make pirated copies unusable. The Copyright Law Review Committee (CLRC), in its 1995 Report *Computer Software Protection*, noted the AutoCAD was an appropriate means to protect copyright rights.³⁶ It should be noted, however, that the CLRC’s reasoning assumed that the AutoCAD lock did not just ‘deter’ infringement — it also prevented *subsequent* infringement, because the CLRC accepted that *use* of a computer program involves making a reproduction in material form, and such a reproduction is only legitimate when made from a legitimate copy.³⁷ So, where the AutoCAD lock prevented use of ‘pirated’ copies of the AutoCAD program, it was ‘preventing infringement’ in this *direct* way, and arguably would be covered by Sackville J’s interpretation.

Sackville J’s interpretation has some clear advantages. Software program locks and access controls on databases are the two main examples of access controls most frequently cited in the legislative history that preceded the *Digital Agenda Act*. Both are arguably captured by Sackville J’s interpretation. Sackville

34 *Kabushiki Kaisha Sony Computer Entertainment v Stevens* (2002), above n15 at 523–524 [115].

35 Issues surrounding the AutoCAD lock were litigated in *Autodesk Inc v Dyason (No 1)* (1992) 173 CLR 330; see also Lindgren J’s description of the lock: *Sony*, above n1 at 188 [95].

36 Copyright Law Review Committee, *Final Report, Computer Software Protection* (1995) at [10.90]. The use of these reports in the debates that preceded the *Digital Agenda Act* is traced by Lindgren J in *Sony*, above n1 at 191 [103], 192 [107]. The AutoCAD lock is also relied on as an example by Lindgren J: *id* at 201 [138].

37 *Id* at [10.10]–[10.12] and Recommendation 2.15.

J's interpretation has a further advantage. By focusing on direct causal relationship between the TPM and infringement, Sackville J's approach frees the court from the possibility that it will have to engage in a broad, uncertain investigation of when infringement will be 'deterred' by a technological lock. Sackville J's interpretation also, arguably, has some disadvantages. It would mean that mechanisms adopted by Sony which are clearly aimed, in part, at preventing copyright infringement are not protected by the anti-circumvention laws.

(ii) *The Broad Interpretation of the Full Federal Court*

A second alternative for the High Court is to adopt the view of the Full Federal Court. This would mean reading the definition of TPM broadly, so as to include 'a device which [has] the practical effect of discouraging infringement of copyright'.³⁸ The trial judge had found that the protective devices used by Sony did have this practical effect.³⁹

On this argument, 'inhibit' is read in accordance with its dictionary definition of 'restrain, hinder, arrest or check' — read broadly to cover not only physical restraints or checks, but also deterrence. It does not matter that the infringement restrained or hindered occurs prior to the operation of the actual protective device. It is enough that the knowledge of the protective device, and how it will work, acts as a disincentive for infringement.⁴⁰

The advantages of the Full Federal Court approach are clear. It is an interpretation that is at least arguably open on the text of the provision, even if it is also the broadest possible interpretation of that provision. It will also ensure that the statute captures a set of mechanisms — the access control system used by Sony — which are clearly aimed, in part, at copyright enforcement, and which, according to the trial judge, actually have this effect. The interpretation does, however, also have its disadvantages: it means that Sony can use its TPMs for non-copyright related purposes, like region-coding. It is also uncertain in its effects — just how 'indirect' a deterrence of infringement will be sufficient is unclear.

(iii) *A Third Alternative: A Sole or Dominant Purpose Test*

A third alternative is also available to the High Court: one which was presented to the trial judge and Full Federal Court by the Australian Competition and Consumer Commission (ACCC).⁴¹ According to the ACCC, a mechanism ought to be

38 *Kabushiki Kaisha Sony Computer Entertainment v Stevens* (2002), above n15 at 522 [109] (describing the argument); for the acceptance of this argument see *Sony*, above n1 at 201 [138]–[139] (Lindgren J); 171 [17] (French J).

39 *Kabushiki Kaisha Sony Computer Entertainment v Stevens* (2002), above n15 at 522 [109].

40 *Id* at 523 [111].

41 The ACCC were given permission to appear at trial as *amicus curiae*: *Kabushiki Kaisha Sony Computer Entertainment v Stevens* (2001), above n2, and were given leave to make written submissions before the Full Federal Court: *Sony*, above n1 at 175 [33]. The ACCC also appeared at a hearing in Chambers where directions were made regarding Mr Stevens' legal representation, and indicated their intention to seek leave to appear as *amicus curiae*, depending on what written submissions were made to the High Court: *Stevens v Kabushiki Kaisha Sony Computer Entertainment & Ors*, above n1.

considered a TPM within s10(1) *only* where it is designed *solely* to prevent or inhibit infringement of copyright.⁴²

Both the trial judge,⁴³ and the Full Federal Court⁴⁴ gave this argument very short shrift, and no wonder: this interpretation is the hardest to reconcile with the text of the s10 definition. This is unfortunate, because this interpretation is actually one of the most attractive from a policy perspective: it could achieve the objectives of the Act — better copyright enforcement — without leading to a de facto right to control (all forms of) access.

The policy problem with which the ACCC is concerned reflects a general tension that exists between two important policy aims. On the one hand, the goal of copyright is to promote innovation and creativity by providing protection for new works. Copyright works by temporarily granting certain exclusive rights to deal with copyright material. On the other hand, there is the policy goal of promoting competition — the process of rivals striving for advantage in the supply of goods and services in the market. The exploitation of the exclusive rights granted by copyright can, in some circumstances, unduly restrict or distort competition.⁴⁵ One such situation relates to geographical segmentation of markets. The importation of copies of copyright works produced overseas with the consent of the copyright owner in the country of production (that is, non-infringing copies) is known as parallel importation. Where copyright owners may prevent parallel importation, they may use this power to geographically segment markets and charge different prices in those markets. The Intellectual Property and Competition Review Committee in 2000 concluded that this kind of geographical segmentation of markets was unlikely to advantage Australian consumers, concluding that because Australia is a small market, with high per capita incomes, copyright owners are likely to set higher prices in the Australian market than elsewhere.⁴⁶ In recent discussion of the AUSFTA, there has been some evidence that prices in Australia are, indeed, higher.⁴⁷

Around the world, some countries allow parallel importation of copyright goods, and some do not. While US copyright law does not allow parallel importation, within the European Union restrictions on parallel importation were held contrary to the principle of free movement of goods.⁴⁸ In Australia, some restrictions on parallel importation have been relaxed or removed over the last few years.⁴⁹

42 See *Kabushiki Kaisha Sony Computer Entertainment v Stevens* (2002), above n15 at 521 [103]–[104] (rejecting this argument).

43 *Ibid.*

44 *Sony*, above n1 at 181 [69].

45 McKeough et al, above n10 at [22.29]; Intellectual Property and Competition Review Committee (IPCRC), *Review of intellectual property legislation under the Competition Principles Agreement* (2001).

46 IPCRC, *id* at 62.

47 David Richardson, 'Intellectual Property Rights and the Australia-US Free Trade Agreement', Parliamentary Library Research Paper No 14 2003-04 at 16–17 (finding, on an admittedly unrepresentative survey, that prices in Australia were around 50% higher than in the United States for certain Sony PlayStation games).

The concern of the ACCC and others is that TPMs may be used, or are being used, to re-impose geographical segmentation. As noted above, the mechanism used by Sony on its PlayStation games also operates to restrict use of games purchased in a different region. Where Sony uses region-coding in a situation where parallel importation is allowed, the effect is that Sony is able to leverage legislative protection for TPMs to give it broader powers of control over pricing and distribution than copyright law would provide. Similar region-coding is also applied, currently, to DVDs, and the ACCC has expressed concern that it will be applied to other digital media systems.⁵⁰ Considerable concern has also been raised that TPMs may be used for still further purposes, even beyond geographical segmentation. For example, the open source community is concerned that copyright owners will use TPMs in a way that will prevent the manufacture of open source digital media players.⁵¹

On an interpretation which required that the sole purpose of a TPM be to prevent infringement, if Sony used its access control system *only* to prevent the use of *infringing* copies — if, for example, the same access code was used in every geographic region — it would be a TPM. It would be the attempt by Sony to grab a broader monopoly than copyright allows, *leveraging* the legal protection of TPMs, by incorporating regional playback control, which would take the mechanism outside the protection of s116A. This would provide copyright owners with an incentive to use anti-circumvention law *only* for the purposes for which it was provided in the first place: better copyright enforcement. To the extent that we would like our design of the law to discourage leveraging which adversely affects consumers,⁵² this is a desirable outcome.

There is some international precedent for such an approach.⁵³ A sole purpose interpretation is also arguably the interpretation which most accords with what the legislature *thought* they were doing — giving copyright owners better mechanisms for enforcing their copyright rights. Throughout the legislative history of the anti-circumvention provisions, they are referred to as enforcement mechanisms —

48 *Musik-Vertrieb Membran v GEMA* Joined Cases 55 & 57/80 [1981] ECR 147, 2 CMLR 44; Sir Hugh Laddie, Peter Prescott, Mary Vitoria, Adrian Speck & Lindsay Lane, *The Modern Law of Copyright and Designs* Vol 2 (3rd ed, 2001) at [31.12]–[31.22]. This does not apply to goods first put on sale outside the European Union: parallel importation from outside the EU may be restricted.

49 *Copyright Amendment (Parallel Importation) Act* 2003 (Cth) (software and certain electronic publications); *Copyright Amendment Act (No 2)* 1998 (Cth) (sound recordings, accessories to imported goods); *Copyright Amendment Act* 1990 (Cth) (books).

50 ACCC, above n17 at [10]. The Australian Consumers Association has raised similar concerns: see Australian Consumers Association, Submission to the Digital Agenda Review, above n17.

51 The concern is that copyright owners will use a TPM and refuse to grant a license of the TPM in open source implementations. This would mean open source players, or open source desktop systems, would not be able to play digital media encrypted using the relevant TPM. See Mr R Russell, Supplementary Submission to the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, Submission No 165a: <http://www.aph.gov.au/Senate/committee/fretrade_ctte/submissions/sublist.htm> (26 October 2004).

52 The adverse effects of geographical zoning are explained in the ACCC Submission to the Digital Agenda Review, above n17.

giving copyright owners better means for enforcing copyright.⁵⁴ And in the existing legislative history, there is some, very limited support for such a view. In particular, there is the fact that the Australian Government chose *not* to adopt the approach from the European Union, and the United States, pushed by certain copyright owners,⁵⁵ which bans not only devices *designed* to circumvent, but also those which:

- have only a limited commercially significant purpose or use other than to circumvent a TPM; or
- are marketed with for use in circumventing a TPM.⁵⁶

It could be argued that the legislature was here taking a cautious approach, aimed at ensuring that these new and controversial copyright provisions did not capture too many forms of technology. By refusing to extend the definition of circumvention device, the government avoided capturing a wider range of technologies which might conceivably be used to circumvent technological locks. By parity of reasoning, it could be argued that the legislature only intended to protect TPMs which were for enforcing copyright — not for any other purpose the copyright owners might come up with, in addition to enforcing copyright. It could also be argued that the wording ‘in the ordinary course of its operation’ gives some support to a view that mechanisms which do more than simply prevent infringement may not be TPMs.

Unfortunately, however, the reality is that this interpretation may require more ‘reading in’ than the High Court is prepared to undertake.⁵⁷ This approach should, however, be seriously considered by the legislature in its rewriting of the anti-circumvention laws, in light of the concerns that have arisen about region-coding.

53 *Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs* [1991] OJ L 122/42, Art 7.1(c). However, it should be noted that while this ‘sole intended purpose’ was the test adopted in relation to computer programs back in 1991, when the Information Society Directive was adopted in 2001, no such limitation was included: *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society* [2001] OJ L 167/10 (hereinafter *Information Society Directive*), Art 6. Indeed, the more limited approach was explicitly considered, and rejected by the EU: European Commission, *Follow-up to the Green Paper on Copyright and Related Rights in the Information Society*, 20 November 1996, COM (96) 568 final at 16.

54 In the Second Reading Speeches on the *Digital Agenda Act*, the anti-circumvention laws are consistently referred to as ‘new enforcement measures in response to the problems posed by new technologies’: see Commonwealth of Australia, Senate, *Parliamentary Debates (Hansard)*, 17 August 2000 at 16580 (Senator Bolkus), 16593 (Senator Alston).

55 Including the IIPA, above n23 at 5–6; see also the Australian Copyright Council, Comments on draft Copyright Amendment (Digital Agenda) Bill 1999, 19 March 1999 at 13–14: <<http://www.copyright.org.au/PDF/Submissions/X9903AGEN.pdf>> (25 October 2004).

56 17 USC §§1201(a)(2), 1201(b); *Information Society Directive* above n53, Art 6.2.

57 It is also, arguably, subject to a criticism that *no* device can be ‘solely’ designed to prevent infringement, since this would require the device to differentiate between, eg, infringing and non-infringing uses — eg, uses which are and are not fair dealings: David Brennan, ‘Technological Measures in the New Copyright Law’ (2000) 11 *AIPJ* 83 at 87. There are probably ways around this particular criticism, however, were it otherwise open on the text.

B. Which Alternative is Consistent with the Legal and Historical Context?

Both the first and second alternatives outlined above are available on the text of ss10(1) and 116A of the *Copyright Act*. As Lindgren J noted in the Full Federal Court, the issues of construction here are ‘finely balanced’.⁵⁸ What turned the issue for Lindgren J, with whom Finkelstein J agreed, was his Honour’s reading of the legislative and contextual history of the anti-circumvention laws. Given the importance of this history to Lindgren J’s final conclusion, it is worth re-examining some of the key points on which his Honour relied,⁵⁹ before turning to some more general comments on how the courts should approach the interpretation of these kinds of provisions in this fast-moving area of the law.

First, Lindgren J relies on the references, in the legislative history, to the concept of ‘unauthorised access’, and comments that copyright entitles an owner to deny access even for lawful use.⁶⁰ It is certainly true that this is a constant theme in the legislative history. But it is worth noting that the concept of ‘access’ in this area of digital copyright law is a rather amorphous one. ‘Access’ can mean all kinds of things. It can mean access in the sense of the ability to apprehend or perceive the copyright work in some form or other, digital or analogue for the first time. It is clear that, as a historical matter, copyright owners have the exclusive right to grant ‘access’ to their work in this sense; in other words, copyright law and policy do not require a writer to publish their work. Indeed, in Australian law the ‘right of first publication’ is one of the exclusive rights granted to a copyright owner.⁶¹ There is also a distinction between ‘access to a work’ and ‘access to a copy of a work’, which is often not properly recognised or acknowledged.⁶² When I purchase a DVD, I have gained lawful access to a *copy* of a work. But have I gained lawful access to the work? Or does that only occur when I play the DVD? These distinctions can be important but are not always clearly stated. Furthermore, the control over access to an online database is a very different matter from controlling each act of ‘access’ to a legally purchased copy of a work. One may be more justifiable than the other, and it is not at all clear that the frequent references to ‘access’ in the legislative history were intended, or foreseen, as covering all of these acts. Finally, ‘access’ appears to have been very broadly interpreted, on occasion, in the United States, to include even the process of one computer program ‘querying’ another.⁶³ Given all the possible meanings and understandings of access, we need to be careful about reading too much into the general comments

58 *Sony*, above n1 at 186 [85].

59 These are listed in *Sony*, id at 201 [138].

60 *Ibid*.

61 *Copyright Act* 1968 (Cth) ss31(1)(a)(ii) (literary, dramatic and musical works), 31(1)(b)(ii) (artistic works); *Avel Pty Ltd v Multicoin Amusements Pty Ltd* (1990) 171 CLR 88 at 93 (stating that the right to publish a work is the right ‘to make public that which has not previously been made public in the copyright territory’).

62 See Jane Ginsburg, ‘Copyright Legislation for the “Digital Millennium”’ (1999) 23 *Colum-VLA J.L. & Arts* 137 at 140–141.

63 See, eg, *The Chamberlain Group, Inc v Skylink Technologies, Inc* 381 F 3d 1178 (2004), where the US Federal Circuit Court of Appeals appears to accept that there is ‘access’ where a computer program ‘talks to’ another computer program, triggering its internal programming to do something — in that case, open a garage door.

to which his Honour refers. We *can* rely better on specific *examples* of ‘access control’ that was intended to be allowed, but, as is evident from the examples given in Lindgren J’s long excursus, Sony’s particular case was never endorsed in any government document.

More generally, however, there is little sense, from Lindgren J’s description, of the passion with which this particular battle in copyright law has been fought, and the battles which have been fought in numerous fora over the scope of TPMs which should be covered by anti-circumvention laws, both internationally and within Australia. There are occasional hints, in his Honour’s judgment, about the fierce contest that accompanied the drafting of these provisions — the references, for example, to the number of submissions made during the process⁶⁴ — but these fail to capture the extent to which the final drafting represented a heavily negotiated compromise.

In my submission, it is not at all clear that the government intended, or foresaw, a broad application of the anti-circumvention laws. I will argue further below that there is reason, in the case where legislation represents a hard-fought, negotiated compromise, to avoid giving an overly broad interpretation of the terms of that compromise. Adopting a narrower interpretation will avoid unintended consequences. But first, we need some appreciation of how that compromise came about.

Lindgren J rightly points out that an original source of the anti-circumvention laws at an international level is the provision of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Article 11 of the WCT provides:

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

Lindgren J notes that this provision was intended to provide a ‘broad kind of protection’.⁶⁵ Certainly some commentators,⁶⁶ and some countries, including notably the United States, have taken the view that Article 11 of the WCT and the corresponding provision (Article 18) are intended to give very broad, strong protection to copyright owners. Uncritical acceptance of this view, however, underestimates the extent to which the provision was itself a compromise, drafted deliberately vaguely to allow flexibility and overcome objections during the Diplomatic Conference to the original proposal which was stronger and more specific.⁶⁷

64 *Sony*, above n1 at 188 [96], 191 [104], 193 [110], 195 [114].

65 *Id* at 201 [138].

66 Mihaly Ficsor, *The Law of Copyright and the Internet: the 1996 WIPO Copyright Treaties, their Interpretation and Implementation* (2002) at Ch 6.

Comments in the Draft Proposal which preceded the WCT emphasised the flexibility of the provision and the ability of contracting states to 'choose appropriate remedies according to their own legal traditions', and, particularly, to 'design the exact field of application of the provisions envisaged ... taking into consideration the need to avoid legislation that would impede lawful practices and the lawful use of subject matter that is in the public domain'.⁶⁸ Even with these statements, the original draft proposal had little support at the conference: many delegations expressed deep concerns about the implications of such a regulation for the public domain.⁶⁹ The European Union emphasised the importance of a 'knowledge of infringement' requirement in any provision regulating devices and services possessing technology-defeating purposes.⁷⁰ The Australian delegation at the Conference noted that the Article could restrict access to public domain material and uses of copyright material sanctioned by law, and preferred an approach focused on the use of devices for the purposes of infringement.⁷¹ The provision which emerged from the Conference was less specific, and more watered-down, than that in the Basic Proposal.⁷²

As a result, while it is true, therefore, that as Lindgren J notes, Article 11 is broad enough to cover devices like Sony's,⁷³ it is also true, as commentary from the time of the treaties indicates, that Article 11 is vague enough to allow Sackville J's approach, or other similarly narrow approaches that would exclude Sony's devices from protection.⁷⁴

Nor has the provision, even once accepted in the WCT, had an easy road to implementation around the world. On the contrary, the introduction of anti-circumvention laws has been very fiercely contested. In the United States, negotiation of the Act which led to the *Digital Millennium Copyright Act 1998*

67 Art 13 of the original proposal for the WCT required parties to 'make unlawful the importation, manufacture or distribution of protection-defeating devices, or the offer or performance of any service having the same effect, by any person knowing or having reasonable grounds to know that the device or service will be used for, or in the course of, the exercise of rights provided under this Treaty that is not authorized by the rightholder or the law'. 'Protection-defeating devices' were defined as 'any device, product or component incorporated into a device or product, the primary purpose or primary effect of which is to circumvent any process, treatment, mechanism or system that prevents or inhibits any of the acts covered by the rights under this Treaty'. WIPO Secretariat, *Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to be Considered by the Diplomatic Conference*, CRNR/DC/4 (30 August 1996) (hereinafter Basic Proposal).

68 Basic Proposal, id at Notes 13.04, 13.05. As Jamie Wodetzki has put it, '[t]he treaty was drafted almost deliberately ambiguously so that different countries could go away and have this battle in their own domestic legislatures': Mr Jamie Wodetzki, Australian Digital Alliance, Commonwealth of Australia, House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Parliamentary Debates (Hansard)*, 21 October 1999 at 178.

69 Pamela Samuelson, 'The U.S. Digital Agenda at WIPO' (1997) 37 *Va J Int'l L* 369 at 413-414, 435.

70 Id at 414.

71 Thomas Vinje, 'The New WIPO Copyright Treaty: A Happy Result in Geneva' (1997) 19 *EIPR* 230 at 235.

72 Samuelson, above n69 at 414-415.

73 *Sony*, above n1 at 190 [101].

74 Samuelson, above n69; Vinje, above n71.

(US) (known as the DMCA) has been described as a ‘battle between Hollywood and Silicon Valley’,⁷⁵ characterised by ‘high rhetoric, exaggerated claims, and power politics from representatives of certain established but frightened copyright industries’.⁷⁶ Intense lobbying led to a plethora of exceptions which ‘betray their origins in interest-group lobbying’ and have ‘no coherent vision of appropriate limits’.⁷⁷ Europe, too, saw similar battles over its Information Society Directive, Article 6 of which introduced anti-circumvention laws into Europe.⁷⁸ Professor Hugenholtz has described ‘the unprecedented lobbying, the bloodshed, the vilification, the media propaganda, the constant hounding of EC and government officials’ that accompanied the multiple stages of negotiations over that Directive.⁷⁹

In Australia, the *Digital Agenda* amendments were the subject of very extensive debate. The process perhaps began in 1994 with the report of the Copyright Convergence Group.⁸⁰ In 1995, the CLRC released its *Computer Software Protection* report, which mentions anti-circumvention laws.⁸¹ In 1997, following the conclusion of the WIPO Copyright Treaties in December 1996, the Attorney-General’s Department and the Department of Communications and the Arts released a discussion paper, *Copyright Reform and the Digital Agenda*.⁸² Seventy-one submissions were made in response to this discussion paper, and 13 face-to-face consultations were held.⁸³ In April 1998, the Attorney-General and the Minister for Communications and the Arts announced that the government would implement the digital agenda copyright reforms.⁸⁴ An Exposure Draft of the Copyright Amendment (Digital Agenda) Bill 1999 was released in February 1999. This led to over 80 submissions and numerous meetings with stakeholders.⁸⁵ An amended Bill was introduced into Parliament on 2 September 1999. The Bill was then sent to the House of Representatives Standing Committee on Legal and Constitutional Affairs (the Andrews Committee), which received some 98

75 Ginsburg, above n62 at 148.

76 Pamela Samuelson, ‘Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised’ (1999) 14 *Berkeley Tech LJ* 519 at 533.

77 Ginsburg, above n62 at 148.

78 *Information Society Directive*, above n53.

79 Berndt Hugenholtz, ‘Why the Copyright Directive is Unimportant, and Possibly Invalid’ (2000) 11 *EIPR* 501.

80 Copyright Convergence Group, *Highways to Change — Copyright in the New Communications Environment* (August 1994).

81 CLRC, above n36, discussed by Lindgren J, *Sony*, above n1 at 188–190 [96]–[99].

82 Commonwealth Attorney-General’s Department and Department of Communications, Information Technology and the Arts, *Copyright Reform and the Digital Agenda — Discussion Paper — Proposed Transmission Right, Right of Making Available and Enforcement Measures* (1997).

83 Explanatory Memorandum accompanying the Copyright Amendment (Digital Agenda) Bill 1999 (Cth) at 16–17.

84 Parliament of Australia, Parliamentary Library, Bills Digest No 102 1999-2000: Copyright Amendment (Digital Agenda) Bill 1999: <<http://www.aph.gov.au/Library/pubs/bd/1999-2000/2000bd102.htm>> (12 October 2004).

85 Explanatory Memorandum accompanying the Copyright Amendment (Digital Agenda) Bill 1999 (Cth) at 18.

submissions and held four days of public hearings, and which reported in December 1999, making 38 recommendations, some 21 of which were accepted by the government in one form or another.⁸⁶ Following these amendments, the Bill was re-introduced into and passed by both Houses. Even at this final stage, a brief review of the various second reading speeches given reveals very different perspectives on the legislation: some Members suggested it did not go far enough; others suggested it might go too far, many recognised the need to ‘wait and see’. Given this history, we need to recognise that the final form of the anti-circumvention provisions was a compromise; the result of brokering by the Australian Government between many competing stakeholders.

A further interesting point about the history of the anti-circumvention provisions, which is perhaps not conveyed by Lindgren J’s detailed excursus, is the way in which successive drafts of the legislation *started* with a narrow drafting of the anti-circumvention provisions, and gradually broadened during the process of negotiation, but notably without ever adopting the full, broad interpretation which copyright owners sought.⁸⁷

When the Exposure Draft of the Digital Agenda legislation was first published in February 1999, the provision was quite limited: it focused on technological protection measures which ‘prevent or inhibit the infringement of copyright subsisting in any work or other subject-matter’.⁸⁸ It also included a key limitation on liability: the requirement that a seller of circumvention devices knew, or was reckless as to whether, the device would be used *for the purpose of infringing copyright*.⁸⁹ This mental element — consciously adopted in contradistinction to the (at that time draft) European Directive,⁹⁰ was included ‘to ensure that the enforcement measure provisions do not limit the operation of the exceptions to the exclusive rights of copyright owners’.⁹¹

When a revised Bill was presented to Parliament in September 1999, the definitions of ‘technological protection measure’ and ‘effectiveness’ were retained. In response to copyright owner concerns, however, the mental element was removed and, in effect, the onus switched.⁹² Now, instead of copyright owners

86 Mr Andrews MP, House of Representatives, Commonwealth of Australia, *Parliamentary Debates (Hansard)*, 27 June 2000 at 18357–18358.

87 The broad view may have been obtained through the AUSFTA, above n5, Art 17.4.7. However, even here, it appears, from comments in the Senate Select Committee, that the government may take a narrower view of this Article than the United States: Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, Parliament of Australia, *Final Report on the Free Trade Agreement between Australia and the United States of America* (2004) at [3.133]–[3.175].

88 Copyright Amendment (Digital Agenda) Bill (Cth), Exposure Draft, February 1999, Item 14.

89 *Id.*, Items 85, 88.

90 *Id.* at [91]–[92].

91 *Id.* at [92].

92 Submission to House of Representatives, Standing Committee on Legal and Constitutional Affairs, Commonwealth Parliament, 30 September 1999 (Attorney-General’s Department and the Department of Communications, Information Technology and the Arts) at [2.25]–[2.26] (explaining the purposes behind the change).

having to prove knowledge or recklessness as to infringement, which was said to be impracticable, those seeking a circumvention device would have to declare they had a legitimate purpose (or ‘permitted purpose’, in the parlance of the Act).⁹³

The Andrews Committee recommended still further adjustments. The Committee, apparently in response to concerns that protecting ‘access controls’ would lead to an extension of copyright owner’s rights, tentatively suggested that TPMs be defined only as ‘copy controls’ — that is, devices (etc) ‘designed to prevent or inhibit the infringement of copyright subsisting in a work or other subject matter’.⁹⁴ On this approach, *no* access controls — including the type used by Sony — would have been TPMs.⁹⁵

Lindgren J makes much of the fact that this tentative suggestion was not accepted by the government: that, instead, a reference to ‘copy controls’ was inserted into the Bill which finally went before the Parliament in 2000. However, there is good reason to beware of drawing too strong an inference here. First, there is a gap in the recorded legislative history. There is no clear explanation, in the final explanatory memorandum, or in the various speeches given to Parliament, as to why the Andrews Committee recommendation was not accepted. Second, rejection did not represent a broad endorsement by the government of a view that all access controls should be protected. It should be recalled that, at this time, the publicly stated position of some powerful copyright owner interests was that access controls did not prevent or inhibit infringement.⁹⁶ They pushed, instead, for the following definition of technological protection measures, which would effectively mirror the US legislation:⁹⁷

‘Effective technological protection measure’ means any technology, device, or component that, in the normal course of its operation, controls access to a protected work, sound recording, or other subject matter, or protects any copyright as provided by this Act.

By retaining the concept of ‘preventing or inhibiting infringement’, the Australian Government showed some reluctance to give broad access control to copyright owners.

93 The permissible exceptions were also cut back — under the Exposure Draft, owing to the requirement of proving a knowledge of *infringement*, any exception to copyright infringement would have sufficed to negate the mental element. Under the new Bill, fair dealing was not included as a ‘permitted purpose’.

94 House of Representatives Standing Committee on Legal and Constitutional Affairs, Commonwealth Parliament, *Advisory Report on the Copyright Amendment (Digital Agenda) Bill 1999* (1999) at [4.19]. Strangely, this preference was not proposed as a formal ‘recommendation’ of the Committee. The Committee was only prepared to go so far as to suggest that this solution ‘may be preferable’: *ibid*.

95 It is worth noting, at least in passing, that in other respects the Andrews Committee suggested that the protection be *strengthened*, eg, by implementing a ban on the act of circumvention: Recommendation 14.

96 IIPA, Submission to House of Representatives, Standing Committee on Legal and Constitutional Affairs, Commonwealth Parliament, 7 October 1999 at 5.

97 17 USC §1201.

What conclusion should we draw from this? I do not seek to argue that the legislative history cannot support Sony's position, or Lindgren J's conclusions. The purpose of this exploration of the legislative history has been to show that the picture is not as clear as it might appear from his Honour's judgment. This is not a criticism of his Honour. It would simply not be possible to present all the legislative history on anti-circumvention laws in Australia and around the world in a judgment of reasonable length. It was a long, drawn out, complicated, and closely negotiated process, and even on the very extensive documentary material that does exist, our picture is inevitably only partial, because much happens outside the formal proceedings of a Committee.

The question then for the High Court is — how should the question of statutory interpretation be approached, in the face of this extensive history, and a legislative provision which is a heavily negotiated compromise? In the next part, I will argue that the High Court should take a cautious approach, and avoid extending the interpretation of the provision beyond its clear application.

4. *General Comments: The Proper Approach to Statutory Interpretation in Sony*

The appeal in *Sony* will be the second copyright case to reach the High Court in three years. The last copyright case, *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd*⁹⁸ (referred to hereinafter by its colloquial name, *The Panel*)⁹⁹ concerned rights to broadcast material, and turned exclusively on questions regarding the interpretation of provisions in the *Copyright Act* which defined the rights of broadcasters. *Sony*, too, will require the court to consider difficult and 'finely balanced' questions of statutory interpretation.¹⁰⁰ A focus on statutory interpretation, while sometimes baffling to the media to whom academics try to explain the decisions, is not surprising to copyright initiators: copyright is, as courts have continuously affirmed, 'a creature of statute'.¹⁰¹ In *Sony* the High Court has the opportunity to apply views expressed on statutory interpretation in *The Panel*.

Certain principles of statutory construction are well known, even unquestioned. In *The Panel*, members of the High Court were unanimous in affirming that the proper approach to statutory construction is a purposive one:¹⁰²

98 (2004) 205 ALR 1.

99 The case concerned the use of 'snippets' of broadcasting material used in a humorous late night commentary/current affairs/entertainment television show called 'The Panel'.

100 *Sony*, above n1 at 186 [85].

101 *Pacific Film Laboratories Pty Ltd v FCT* (1970) 121 CLR 154 at 166, *Sega Enterprises Ltd v Galaxy Electronics Pty Ltd* (1996) 139 ALR 518 at 523, *Bulun Bulun and Milpururru v R & T Textiles Pty Ltd* (1988) 41 IPR 513 at 525; *CCH Canadian Ltd v Law Society of Upper Canada* (2004) 236 DLR (4th) 395 at [9].

102 Lord Steyn has called purposive construction 'like mother's milk and apple pie: who can argue against it?' Lord Steyn, 'The Intractable Problem of the Interpretation of Legal Texts: The John Lehane Memorial Lecture 2002' (2002) 25 *Syd LR* 5 at 16. The purposive approach is required under the *Acts Interpretation Act* 1901 (Cth) s15AA. Section 15AA requires that the court consider the purpose of the statute regardless of whether the language is unclear: *Mills v Meeking* (1990) 91 ALR 16 at 30–31.

that the court may consider the intention of the legislature and the ‘mischiefs’ the legislation was intended to remedy, in determining the meaning of the words used.¹⁰³ They were also unanimous in considering that courts can and should consider the legal and historical context of an Act, in the process of giving meaning to the words of the statute.¹⁰⁴

Nevertheless, as Lord Steyn has noted, statutory interpretation is an art rather than a science.¹⁰⁵ Intonations of these very general principles of interpretation only take us so far. On the particular question of the approach to interpreting the rights granted by copyright law, there are two key issues in the *Sony* appeal:

1. First, to the extent that there are two or more plausible interpretations, should the court favour an interpretation which leads to a more liberal construction of the rights of copyright owners?
2. Second, how should the Court deal with the legal and historical context in which the anti-circumvention provisions were adopted?

It is submitted that both principle, and the legal and historical context support a more wary, incremental approach in reading the anti-circumvention provisions.

A. *Principle*

Australian courts have sometimes stated that copyright owners’ rights should be interpreted beneficially. Certain comments of Kirby J in *The Panel* summarise this view:

[B]ecause ... the Act afforded new and larger copyright entitlements in Australia, it would be contrary to basic principle and the ordinary canons of statutory construction to restrict those entitlements in a way that conflicted with the language of the Act or that unduly narrowed its operation. Normally, an amendment of an Act to provide new rights of such a kind will be given a beneficial construction so as to ensure that the purpose of the legislature is truly attained.¹⁰⁶

103 *Mills v Meeking*, id at 30 (Dawson J). See *The Panel*, above n98 at 3–4 (McHugh ACJ, Gummow & Hayne JJ), 24–25 (Kirby J), 39 (Callinan J).

104 *The Panel*, above n98 at 3–4 (McHugh ACJ, Gummow & Hayne JJ), citing *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 112; *Attorney-General (NSW) v Stocks and Holdings (Constructors) Pty Ltd* (1970) 124 CLR 262 at 283 (Windeyer J). ‘Extrinsic materials’ are allowed to be consulted under s15AB of the *Acts Interpretation Act* 1901 (Cth).

105 Lord Steyn, above n102 at 8.

106 *The Panel*, above n98 at 25 [89]. Callinan J was evidently favourably inclined to an interpretation that would prevent the kind of ‘blatant appropriation’ that he saw in the case: id at 39–40 [143]. This is consistent with the views expressed by Callinan J in previous cases: see also his Honour’s judgment in *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, where he advocated consideration of property rights in ‘a spectacle’, motivated by the same kind of impulse against appropriation. For a similar ‘beneficial’ approach to construing intellectual property rights, and in particular copyright, see the judgment of Burchett J in *Sega Enterprises Ltd*, above n101 at 523–524, also *Computer Edge Pty Ltd v Apple Computer Inc* (1986) 65 ALR 33 at 42.

It is possible that, before the High Court, counsel for Sony may seek to rely on this kind of approach.

Any such attempt should be rejected. The first point to note is that the majority in *The Panel* appear implicitly to have rejected the straightforward beneficial approach in interpreting copyright provisions. According to the majority, the ‘context’ which must be taken into account in interpreting the *Copyright Act* includes ‘well-established principles of copyright law’.¹⁰⁷ Reading the majority judgment, it is apparent that these well-established principles include a concept of balance — that the proprietary rights of copyright owners must be set against the ‘loss of freedom of action’ resulting when copyright rights are enlarged.¹⁰⁸ It is also worth noting that the approach of the majority appears to be more in line with approaches being developed by other courts of final appeal around the world. Recent decisions of the Canadian Supreme Court have placed significant emphasis on the need for a ‘balanced’ approach to copyright.¹⁰⁹ And the reference to ‘well-established principles of copyright law’ bears some resemblance to references, in the US Supreme Court decision in *Eldred*, to ‘the traditional contours of copyright protection’.¹¹⁰

In any event, even if the majority in *The Panel* has not rejected a ‘beneficial’ approach, it is submitted that it *cannot* be apt here. It should be confined, at most, to those cases where the court is interpreting the provisions of the *Copyright Act* which identify copyright subject matter where the way that subject matter is expressed has changed. As Kathy Bowrey has noted, ‘the objects of intellectual property law resist effective definition in terms of essences or principles. A consequence of this is that intellectual property laws rely on a high level of legal abstraction’.¹¹¹ It might arguably make sense therefore to interpret these ‘abstractions’ in a way that can accommodate new technologies and new ways of storing work. It may be appropriate, for example, to read a definition of ‘cinematograph film’ which refers to ‘visual images’ as being satisfied where

107 *The Panel*, above n98 at 4 [12].

108 *Id* at 5 [15], citing Professor Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American legal reasoning* (2003) at 174.

109 *CCH Canadian Ltd*, above n101 at [23]. In this case, McLachlin CJ for the court noted that ‘the purpose of copyright law [is] to balance the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator’, and used this as a factor tending to support a higher standard of originality — noting that ‘[w]hen courts adopt a standard of originality requiring only ... industriousness ... they tip the scale in favour of the author’s or creator’s rights, at the loss of society’s interest in maintaining a robust public domain that could help foster future creative innovation.’ The Chief Justice also used this principle in rejecting a broad interpretation of authorisation, stating that it would ‘[shift] the balance in copyright too far in favour of the owner’s rights and unnecessarily [interfere] with the proper use of copyrighted works for the good of society as a whole’: *ibid* at [41]. See also *Theberge v Galerie d’Art du Petit Champlain inc* (2002) 210 DLR (4th) 385 at [30]–[31] (Supreme Court of Canada).

110 *Eldred v Ashcroft* 537 US 186 (2003), 123 S.Ct. 769, 790. On the role these ‘traditional contours’ might play in future US copyright decisions, see Graeme Austin, ‘Copyright’s Modest Ontology — Theory and Pragmatism in *Eldred v. Ashcroft*’ (2003) 16 *CJLJ* 163.

111 Kathy Bowrey, ‘Review: The Making of Modern Intellectual Property Law: The British Experience, 1760-1911’ (2000) 22 *EIPR* 343 at 343.

visual images may be generated from digitally stored material.¹¹² The same argument may apply when interpreting the exclusive rights granted to copyright owners to new technologies of distribution.¹¹³

On the other hand, it would *not* be appropriate to apply this beneficial approach to the interpretation of anti-circumvention laws. First and foremost, anti-circumvention laws are not copyright laws.¹¹⁴ Rather, as noted above, they are ‘paracopyright’ laws,¹¹⁵ which sit above, and beyond, the ordinary rights of copyright owners.

Copyright law grants to copyright owners exclusive rights in subject matter created by them.¹¹⁶ These rights act as constraints on every person who wants to do certain acts in relation to that copyright material.¹¹⁷ If I want to publicly show a film, I must obtain the permission of the copyright owner. Paracopyright — anti-circumvention law — goes even further. It gives the copyright owner the right to injunct the distribution of technologies, created by others, which *threaten to allow* infringement of the copyright owner’s rights. The circle of people constrained by such laws is broader even than the circle of people constrained by copyright, for it now includes non-infringing technology producers. It is no longer possible for a technologist — say, a computer programmer — to avoid the effects of the *Copyright Act* by avoiding copying ‘other people’s stuff’. Indeed, a technologist may be constrained from exploiting her or his undeniable copyright rights by distributing her or his computer program.

Thus unlike copyright law ‘proper’, which is aimed at encouraging and rewarding creativity and innovation,¹¹⁸ such laws are deliberately designed to ‘prevent or inhibit’ certain technological innovations.

112 *Sega Enterprises Ltd*, above n101, affirmed by the Full Court in *Galaxy Electronics Pty Ltd*, above n20.

113 See, eg, the judgment of Kirby J in *Telstra v Australasian Performing Right Association Ltd* (1997) 146 ALR 649 at 686, noting that the original target of the diffusion right was that most unlikely of copyright-infringing technologies, the ‘theatrephone’. As Kirby J noted, ‘[t]here is ... nothing in the legislative history of the diffusion right to suggest that its operation was intended to be limited to the particular technological circumstances prevailing at the time the Act was enacted’: *ibid* at 688.

114 As Gummow J noted in the special leave hearing in this case, ‘[i]t is not really copyright legislation as traditionally understood at all. It is something new that is going on.’ *Stevens v Kabushiki Kaisha Sony Computer Entertainment & Ors*, above n1 at 4.

115 Academic writers using the term include Dan L Burk, ‘Anti-circumvention misuse’ (2003) 50 *UCLA LR* 1095, and Neil Netanel, ‘Locating Copyright within the First Amendment Skein’ (2001) 54 *Stan LR* 1. Use of the term ‘paracopyright’ to describe anti-circumvention laws can be traced back to a report of the House Committee on Commerce, considering the United States Act which introduced anti-circumvention law into the United States: the *Digital Millennium Copyright Act* 1998 (now codified in 17 USC §1201): HR Rep No 105-551, pt 2 at 24 (1998).

116 Or, of course, the person from whom the copyright owner purchased the material, or the employer of the person who created the material. Copyright ‘creators’ are not the same as copyright ‘owners’, but this distinction, although too often forgotten, is not germane to this discussion.

117 On the need to consider the actors *constrained by* and affected by a grant of rights, see Jeremy Waldron, ‘From Authors to Copiers: Individual Rights and Social Values in Intellectual Property’ (1993) 68 *Chi-Kent L Rev* 841; see also Peter Drahos, *A Philosophy of Intellectual Property* (1996) at Ch 7, 145–169.

This is not to argue that anti-circumvention laws are in all cases unjustified. The Australian Government, and indeed the international community have decided that some such laws are justified. What I *would* argue is that the effects of paracopyright are broad — broader even than copyright. Thus accepting, contrary to my argument above, that a beneficial approach is appropriate in construing copyright rights, it is not appropriate to these laws. Anti-circumvention provisions should be narrowly interpreted, to avoid undue constraint on too many people and too many new technologies.

In addition, one of the justifications for adopting a ‘beneficial reasoning’ is that the government cannot be expected to update the law every time a new means of creation or exploitation of copyright material arises. Again, such a rationale would be singularly inapt in relation to the anti-circumvention laws. The provisions are currently under review, as a result of the three year review process announced when the legislation was first passed.¹¹⁹ What is more, the provisions will have to be reviewed, and rewritten, as a result of the Australia–United States Free Trade Agreement.¹²⁰ There is no need, in other words, for the court to ‘step in’.¹²¹ To the extent that a narrow interpretation is disfavoured by the legislature, it can (and likely will) be readily fixed. On the other hand, it is a political reality that broad rights, once granted, are much harder to amend or limit.

B. Legal and Historical Context

In *The Panel*, the High Court accepted that the legal and historical context of copyright law is relevant to interpreting copyright provisions. The legal and historical context of the *Digital Agenda Act* outlined above also justifies a circumspect approach to interpreting the rights granted. In particular, two aspects of this context of the *Digital Agenda Act* must be borne in mind.

First, even a brief survey of the legislative history shows that neither the government, nor the legislature generally, saw the Act as being the ‘final word’ on digital copyright law. At the time the legislation was drafted, the members of Parliament recognised that they were, in a sense, attempting to prognosticate future technological developments at a time when Napster was in the process of further revolutionising an already unstable electronic and digital environment. There are extensive references to the fact that the Bill is ‘transitory’, and ‘just another stage as the social trends and business models develop over a period of time’;¹²² and

118 Intellectual Property and Competition Review Committee, *Review of intellectual property legislation under the Competition Principles Agreement* (2001) at 33.

119 See above n11.

120 AUSFTA, above n5, Art 17.12.

121 Note that this kind of justification is, in any event, weak given the capacity of the legislature to react to interpretations they consider too narrow. When in *Apple Computer Inc v Computer Edge Pty Ltd* (1983) 50 ALR 1 a court at first instance declared that certain computer programs were not protected by copyright, the reaction of the Parliament, in extending copyright protection, was almost immediate: *Copyright Amendment Act* 1984 (Cth). The legislature did not even wait for the case to progress through the various levels of appeal.

122 Commonwealth of Australia, Senate, *Parliamentary Debates (Hansard)*, 17 August 2000 at 16585–16586 (Senator Lundy), see also 16588 (Senator Stott-Despoja).

that, after some time, further amendments might be necessary.¹²³ These attitudes are, of course, further supported by the existence of the three year review.¹²⁴ This strongly suggests that the court should take a view equally cautious to that adopted by the legislature in passing the legislation.

Second, in reading the anti-circumvention provisions, the court confronts a particularly interesting, and difficult problem of statutory interpretation: what is the proper approach to interpreting a statutory provision which embodies a heavily negotiated compromise? The general rule is that a statute must be interpreted in accordance with its ‘purpose’.¹²⁵

Now, to some extent, the concept of a legislative ‘intention’ or purpose is always something of a myth. The legislature is a composite, complex body and it does not have one legislative intention that can be divined by reading the debates and the extrinsic materials.¹²⁶ But the problems faced when legislation is a negotiated compromise are particularly acute. As Gummow J has pointed out in his extrajudicial writings, ‘statutes which on their face do speak directly to their subject may well be the result of compromise’, forged in a process of negotiation between different political parties, which ‘may be responding wholly or partly to private representations by a range of interest groups’.¹²⁷ This means, as his Honour points out, ‘[t]he final text of a Bill may be the product of a compromise made outside the legislative chambers and not fully disclosed by public debate in the legislature or elsewhere.’¹²⁸ As already noted above, that is exactly our problem, in relation to the *Digital Agenda Act* provisions. The definition of ‘technological protection measure’ is a compromise, which was neither as restrictive as some copyright users had hoped, nor as broad as copyright owners sought — and parts of the legislative history are opaque.

What are the implications of this for statutory interpretation? It means that identifying one ‘purpose’ in such cases may end up privileging one party or set of interests involved in the negotiation over the other. In other words, the court can end up ‘picking a winner’ where the legislature consciously refrained from so doing. There is a serious risk, in these circumstances, of unintended consequences. The proper approach is to read, and apply, only the strict terms of the legislative provision — to enforce the ‘bargain reached’, and not try to extend it to any area that is even arguably not covered.

What does this mean in *Sony*? It means that, on balance, on both a principled basis, and in light of the complex legislative history, a narrower interpretation proposed by Sackville J should be favoured. It is consistent with the language of the statute, and consistent with the proper approach to statutory interpretation in

123 Mr McClelland MP, Commonwealth of Australia, House of Representatives, *Parliamentary Debates (Hansard)*, 26 June 2000 at 18343, 18346 (suggesting that ‘we have to taste it and see what happens for the future’).

124 See references above n119

125 See above nn102–104 and accompanying text.

126 Lord Steyn, above n102 at 14.

127 William Gummow, *Change and Continuity: Statute, Equity and Federalism* (1999) at 26.

128 *Ibid.*

this difficult case. It avoids possibly unintended consequences in allowing copyright owners to leverage legal protection for TPMs to broader control than copyright law would allow. It is consistent with the principle underlying copyright law of encouraging technological and creative innovation. And to the extent that the legislature does not favour the result, the remedy is very readily at hand.

5. *Conclusions*

The High Court took on a difficult task when it decided to grant special leave in *Sony*. Of course, the task is also a fascinating one. And despite the ‘moving target’ nature of the legislation in this area, the findings of the court will likely have significant implications and a telling impact on the process of drafting new anti-circumvention laws following the AUSFTA.

The court will be presented with several different, plausible interpretations of the definition of ‘technological protection measures’. It will be forced to a choice. What I have sought to argue, in this piece, is that everything in the legislative history, and principles of statutory interpretation, urges caution. The legislative history is by no means clear on exactly what was intended to be covered — an inevitable by-product of the attempt to ‘forecast’ in a rapidly changing area of technology. The final provision was a compromise — neither as narrow, nor as broad as the various stakeholders sought. And the court can be confident that the matter will be back before the legislature — soon. In these circumstances, there is no justification for a beneficial interpretation. Given the implications of extending rights unduly in this field, and given the fierce debate in the area, I would urge that the court take a narrower view. To the extent that this leaves copyright owners unsatisfied, a legislative remedy is readily available.

Whichever way the decision of the High Court ends up falling in this case, we at least know that the story cannot end here. We will, in the next two years, see the drafting of new anti-circumvention laws as a result of the AUSFTA.¹²⁹ In any event, copyright owners are highly likely to develop technological protections in ways that are shaped by the High Court’s interpretation.¹³⁰ As MP and then Deputy Chair of the Legal and Constitutional Affairs Committee, Nicola Roxon put it during the debate on the *Digital Agenda Act*:

I think the saying “There are only two things that are certain in life: death and taxes” might need to be changed. I think there might need to be three: death, taxes, and an ongoing debate about the right balance in copyright matters.¹³¹

129 Above n5, Art 17.12.

130 Brian 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 ULR* 354 at 363.

131 Ms Nicola Roxon, Commonwealth of Australia, House of Representatives, *Parliamentary Debates (Hansard)*, 27 June 2000 at 18353.