

# TECHNOLOGY



## LEGAL UPDATE

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## Chips Off The Block – Copyright Users Have Won A Battle But Not The War

*In October the High Court handed down its decision in **Stevens v Kabushiki Kaisha Sony Computer Entertainment** [2005] HCA 58 concerning the use of ‘mod chips’ on PlayStations to allow use of copied PlayStation games. Far from being the conclusive position on technological protection measures (TPMs) in Australia, the High Court’s decision is more likely to be considered a significant battle in an ongoing war between copyright users and owners.*

### Key message

*The High Court has held that it is legal to ‘mod chip’ a Sony PlayStation so that it plays copied games. With further amendments to the Copyright Act being considered, how long will that position last?*

In what could be regarded as a victory for copyright users, the High Court found that Stevens had not breached section 116A of the *Copyright Act 1968* (Cth) (Act) because the protection measures used by Sony did not fall within the Act’s definition of a technological protection measure. Legitimate PlayStation games incorporate encrypted access codes. When CDs are pirated, the access codes are not replicated on the copied CD. The result is that when a PlayStation loads a copied PlayStation game, it cannot read the encrypted access code and will not play the game. The mod chips installed by Stevens circumvented this process, modifying the PlayStation’s operation to allow copied games to be played.

The High Court’s decision was based on a narrow interpretation of the definition of technological protection measure. Critically, this definition requires a technological protection measure to be a device which in the ordinary course of its operation ‘prevents or inhibits the infringement of copyright’. Because the protection mechanism adopted by Sony did not prevent the actual act of

infringement (copying), Sony’s protection mechanism did not fall within the definition. The mod chips, therefore, did not contravene section 116A.

The High Court’s decision will not be the end of the matter. In signing the Australia-United States Free Trade Agreement (FTA), the Australian Government has committed to revising the Act’s provisions in relation to TPMs and prohibitions against circumvention.

Significantly, the FTA describes TPMs as an effective technological measure which is a technology, device or component that, in the normal course of its operation, controls access to a protected work. It is likely that had the Act’s definition of technological protection measure referred to a device which controls access rather than preventing or inhibiting infringement, the High Court’s decision in *Stevens v Sony* may have gone against Stevens. After all, Sony’s protection system arguably did control access to a work and Stevens’ mod chips circumvented that control.

The Australian Government is currently engaged in a review of the copyright rules relating to TPMs. The definition of an effective technological measure in the FTA seems to demand that the current definition of technological protection measure be changed to something which is likely to adversely affect copyright users. It is difficult to anticipate the outcome of the legislative review but what is certain is that the well organised and resourced copyright owner lobby groups will argue strongly for a definition equivalent to that in the FTA.

The success of their arguments will have a significant impact on Australians' ability to make copies of copyright works or even to use copyright protected works purchased legitimately overseas but which may be subject to regional coding. The next confrontation is likely to be interesting.

**Simon McDonald** | Senior Associate



## Custom Made Trouble In Testing Times

*Your old computer system is just not doing the job. There is a push from within your business to upgrade. So, after a due 'tender' process, you engage a systems development consultant to build a system that will take your business processes into the next millennium – or at least drag it into this one.*

### Key message

*The public failure of the Australian Customs Service's new computer system contains important lessons about specifications and acceptance testing. What are the best ways to avoid mistakes?*

The consultants claim the system will have many benefits for your business. It will assist with the efficient running of your workflow, meet your increasing security and privacy requirements and ultimately enhance the turnover and profits of your business.

One of the critical steps before the launch of this new system throughout your business is likely to be acceptance testing. Otherwise, how will you know if the system is going to work? In acceptance testing, some people take the approach that systems are never perfect so the acceptance criteria set should define how imperfect a system can be before it is not accepted. On this view a certain number of defects or bugs may be accepted so long as they are 'unimportant' bugs, rather than those which have consequences which are 'critical to the business'. In the end, however, acceptance of the system means that, after appropriate testing, you are confident it will bring the benefits to the business that were envisaged at the outset of the project.

But many have found that acceptance testing that is not undertaken in a 'live' environment and does not involve the ultimate users of the system can lead to a system that has been accepted and should work, but inexplicably does not when it goes live. Theory versus practice. Users of the

system, including your own staff, suppliers and customers, can be important to the user acceptance phase of the project because they are the ones who are most affected by the system. They will often have practical understanding about how the business processes should operate.

Users can also be involved usefully at an earlier stage when the system's specifications are being developed. If the acceptance tests are to check that the system meets the specifications, it's important that the specifications meet the users' needs and suit their practices.

Customs CIO Murray Harrison provided a classic example of this in relation to the recent high-profile failure of the Customs IT systems upgrade.

"The system is unforgiving when it comes to data quality," Mr Harrison was quoted as saying in the *Australian Financial Review* (29/11/05). "If you don't put the right info in, your cargo won't get cleared. We thought we had done plenty of training and consultation, we expected people to put in the right stuff..."

"That is what the system was built around. It was not built around reacting when they didn't...Perhaps we were too idealistic."

This example highlights that systems developers may be expert in writing the software, but their understanding of the business and its processes is never as good as that of the users. On the same Customs systems upgrade and this time in *The Australian* (25/10/05), the NSW regional director of Customs, David Collins, was quoted as saying, "Things we tested, which worked well, in reality didn't work well".

Even if you have user acceptance testing (UAT), how long do you persist with the UAT and bug fixing before you realise the system cannot 'go live' in the business, that is, it will never work 'in reality'? Do you (or must you under your agreement) tolerate the cost blow-out experienced by the Customs service? One commentator estimated the blow-out to be more than \$200 million. There is also the damage to one's reputation and possible compensation payable to disgruntled customers to consider.

Of course there is no easy answer to this question, a lot will depend on the circumstances of the business and the

systems being developed, not to mention the investment that has been made to date. However, the answer will also depend on your agreement with the supplier. The agreement should clearly provide for what is to happen, by when, and the consequences if it does not.

One mechanism is to ensure, at the outset of the project, that time frames permitted for UAT are carefully drafted with defined phases for the UAT and, when all fails, provide an effective and early 'out' for your business.

The recent high-profile Customs system failure reminds us all that businesses implementing new IT systems need to carefully plan their specifications and specify appropriate and meaningful acceptance tests. The agreement containing that plan should deal with the consequences if the acceptance tests fail. A bit of work upfront can save a lot of grief later.

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