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Copyright has long been a significant issue for libraries and cultural institutions. Since the invention of the photocopier, technologies have developed at a rapid rate, and copyright laws have become increasingly complex in an effort to keep up. This is nothing new to librarians, who must deal with the practicalities of copyright law on a daily basis in carrying out their functions of preserving and providing access to information.

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More often than not, deciphering the meaning of the law relating to copyright presents the largest problem, particularly if there are very few judicial decisions which have interpreted or applied it. Legislation may be drafted with the idea of covering a broad range of situations, or may represent a compromise position between various interest groups, making the intention of the legislature in drafting, and consequently the actual meaning of the law, difficult to determine.

The legislation outlawing the circumvention of technological protection measures ('anti-circumvention legislation') contained in the Copyright Act 1968 and its interpretation in the Sony v. Stevens\(^1\) litigation is a case in point:

...the federal parliament resolved an important conflict between copyright owners and copyright users by an autochthonous solution.\(^2\)

Much modern legislation regulating an industry reflects a compromise reached between, or force upon, powerful and competing groups in the industry whose interests are likely to be enhanced or impaired by the legislation.\(^3\)

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2 ibid.; Per McHugh J at 123.

3 ibid.; Per McHugh J at 126.
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and

There is a good deal of evidence that supports the view that the legislative provisions with which this litigation is concerned are the product of a compromise agreed to, or forced upon, interest groups in the industry affected by the legislation.4

The anti-circumvention legislation was inserted into the Copyright Act with the goal of extending copyright – both its protection and relevant exceptions to infringement into the digital environment.5 The High Court in Sony was presented with the task of defining the relationship between these two interests in the digital environment.

In undertaking this task, the High Court analysed the anti-circumvention legislation and its background, and provided guidance both in relation to these provisions, and regarding fundamental principles of copyright law, including the scope of the fair dealing defences, the relationship between the exceptions to copyright infringement and the anti-circumvention provisions, and more broadly, the rights associated with lawful acquisition of personal property, and implications of an overly protective definition of ‘technological protection measures’ (TPMs) on technological innovation.

In doing so, the Court confirmed the importance of copyright law in facilitating access to information, technological advancement and innovation, and of recognising an appropriate balance of interests in copyright law, notwithstanding the new digital context. From the perspective of libraries, it was a particularly welcome decision recognising the importance of their functions, in an area of law that, over the past decades, has increasingly focused on the protection of copyright, rather than the facilitation of copyright in pursuance of innovation and advancement.

While many interesting aspects of copyright law were raised in the course of the Sony litigation, this article will look particularly at the interpretation of the anti-circumvention provisions, and the implications of the High Court’s findings in light of the Australian legal environment and particularly the Australia–US Free Trade Agreement (AUSFTA).

The anti-circumvention provisions and their interpretation in Sony

In 2000, the Government made substantial amendments to the Copyright Act 1968 by way of the Copyright Amendment (Digital Agenda) Act 2000. These amendments (‘Digital Agenda’ amendments) were introduced in response to the new digital environment, and were aimed at updating the law in light of technological advancements such as the internet.6

As part of these amendments, new enforcement measures were introduced to assist copyright owners in enforcing their rights in the digital environment. The amendments made it illegal to manufacture, import, make available online, advertise, market or commercially supply [circumvention] devices which have ‘only a limited commercially significant purpose or use, or no such purpose or use, other than the circumvention, or facilitating the circumvention, of a technological protection measure’.7

4 ibid.; Per McHugh J at 127.
5 For example, see Copyright Reform: Copyright Amendment (Digital Agenda) Act 2000, the Attorney-General’s Department, this can be viewed at: http://www.ag.gov.au/agd/seclaw/Copyright%20Amendment%20Act%202000.htm
6 Copyright Reform: Copyright Amendment (Digital Agenda) Act 2000, the Attorney-General’s Department, this can be viewed at: http://www.ag.gov.au/agd/seclaw/Copyright%20Amendment%20Act%202000.htm
7 Copyright Act 1968, Section 10.
Pursuant to the Copyright Act, a TPM 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, 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.  

The Digital Agenda amendments minimised problems of statutory interpretation of these very technical provisions by libraries and educational institutions by providing clear exceptions to the ban on dealings with circumvention devices for circumvention done in accordance with their activities. Activities undertaken in pursuance of the library and archive exceptions of the Copyright Act, or in pursuance of the Part VB statutory license for educational institutions and institutions assisting persons with a disability, are exempted from liability under the anti-circumvention laws.9

In 2001 issues surrounding the interpretation of the anti-circumvention legislation were brought to the courts for the first time in the context of Play Station games and consoles. Sony corporation10 filed a law suit against Mr Stevens, who sold and supplied unauthorised copies of computer games (contained on CD-ROMs) for use on Play Station consoles. Ordinarily, Play Station consoles cannot play unauthorised copies because they have a device, known as a Boot ROM, which recognises a specific access code contained on lawful copies of the games. However, Mr Stevens also sold and installed into Sony Play Station consoles, ‘mod chips’ which allowed the consoles to in effect by-pass the access-code requirement, so that unauthorised CDs could be loaded and played as well.11

One of the major issues pertinent to libraries that arose in this case related to how the anti-circumvention legislation of the Copyright Act should be interpreted. Sony argued that a either the console, or a combination of the access code contained in the games and the console, constituted a TPM which ‘prevented or inhibited’ the unauthorised copying of the games. Therefore, Sony argued that Mr Stevens’ activities circumvented Sony’s TPM and should be caught under the anti-circumvention provisions of the Copyright Act.12

Sony’s device however, did not actually physically prevent unauthorised copying of the computer games. Rather, once the games had been copied, Sony’s device rendered the copied games useless, because the Sony consoles did not play the copies, as they didn’t have the access code required. Sony’s device therefore deterred people from copying the games, because copiers would think it a wasted effort as they wouldn’t be able to play the games anyway.

Sony’s argument therefore raised very interesting questions of copyright law interpretation, the answers to which had the potential to affect operations within libraries and cultural institutions, by broadening the reach of copyright protection itself.

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8 ibid.
9 ibid.; Section 116A.
10 Kabushiki Kaisha Sony Computer Entertainment
12 ibid.
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The implications of Sony’s interpretation for libraries can perhaps be more easily seen when this is translated into general copyright law principles: Sony’s argument essentially stated that the legislation covered devices that not only prevented or inhibited copying of copyrighted material (in the physical sense) but also devices that merely prevented access to copyrighted material (i.e., whether or not copying had occurred). Such an interpretation would have enabled copyright owners, via TPMs, to control not only copying of their work, but also access to such works.

An important practical implication of Sony’s interpretation, if drawn to its natural conclusion, is that institutions should be required to enter licences and pay every time material is simply accessed online, where they would not have to in the print environment. Given the vast amount of digital material that is protected by passwords, access codes, dongles, or other technological tools in order to gain access, an extension of the definition of ‘technological protection measure’ could have presented significant additional costs for institutions.13

An important legal problem with this of course is that it would encompass a fundamental change in the current balance of rights provided for by Parliament in the Copyright Act. The exclusive rights of the copyright holder cover a number of acts that involve the copying of a work. These exclusive rights do not however cover linking to a website, reading a book, or in any other way accessing a copyrighted work. In short, the Copyright Act is intended to protect works from being copied. This is indeed consistent with the policy goals underlying copyright law, which include the promotion of innovation, creation and improvement.

Additionally, Sony’s interpretation was inconsistent with the stated intention of Parliament when it introduced the TPM provisions via the Copyright Amendment (Digital Agenda) Act 2000, that the amendments were intended to introduce the same rights in relation to digital works as previously existed in the print environment, rather than provide copyright holders with additional rights over and above those rights already conferred by the Copyright Act in the print environment.14

The case was first heard by the Federal Court in 2002.15 Justice Sackville did not agree with Sony’s interpretation of the anti-circumvention provisions, stating that:

\[\text{a technological protection measure, as defined, must be a device or product which utilised technological means to deny a person access to a copyright work, or which limits a person’s capacity to make copies of a work, to which access has been gained, and thereby physically prevents or inhibits the person from undertaking acts which, if carried out, would or might infringe copyright in the work.}\]

Sony appealed to the Full Court of the Federal Court. Basing its decision largely on statutory interpretation, the Full Court found for Sony17, stating in its decision that:

\[\text{it is not for the court to cage the ordinary meaning of the words which have been adopted by reference to policy considerations of its own divining.}\]

13 This point was raised in the submissions of the Australian Digital Alliance and the Australian Libraries’ Copyright Committee as amici in this case, see http://www.digital.org.au/submission/31.doc;1HC%20Submissions.rtf; at 10, 11.
14 Revised Explanatory Memorandum to the Copyright Amendment (Digital Agenda) Bill 2000 (Cth) at 2, stating that ‘[a]s far as possible, the exceptions [in the Bill] replicate the balance struck between the rights of owners and the rights of users that has applied in the print environment’.
16 ibid., Per Sackville J at para 115
18 ibid., Per French J at para 25.
Mr Stevens then appealed to the High Court of Australia. The High Court did not accept Sony’s arguments, and in October last year, handed down its decision essentially confirming that ‘technological protection measures’ are measures or devices that protect copyright in a work (or other subject matter) rather than access to the copyright work in and of itself.

In its decision, the Court made it clear that anti-circumvention provisions could not be viewed in isolation. The Court provided guidance not only in relation to the scope of the anti-circumvention laws, but also in relation to fundamental principles of copyright law, and the relationship of copyright law to other areas of the law such as anti-competitive conduct and property law. The Court made it very clear that it would read down legislation that purports to take away individual rights:

...in construing a definition which focuses on a device designed to prevent or inhibit the infringement of copyright, it is important to avoid an overbroad construction which would extend the copyright monopoly rather than match it.  

Kirby J particularly looked at the relationship between the anti-circumvention provisions and the fair dealing provisions of the Act, emphasising the importance of the fair dealing exceptions to the ‘copyright balance’ and clearly stating that discarding user rights in spite of the delicate ‘balance’ that copyright requires, may exceed the power granted by the Constitution to the Parliament to enact laws with respect to copyright:

To the extent that attempts are made to push the provisions of Australian Copyright legislation beyond the legitimate purposes traditional to copyright protection at law, the Parliament risks losing its nexus to the constitutional source of power. That source postulates a balance of interests such as have traditionally been observed by copyright statutes, including the Copyright Act.

Thus the High Court recognised the importance of the relationship between the provisions of the Copyright Act to the operation of the Act as a whole, and in doing so, confirmed the function of copyright law in facilitating access to information and promoting innovation and advancement.

Sony and the AUSFTA: where to from here?
The Sony decision of course came at a critical time in the development of Australia’s copyright laws and policies. In 2004, Australia and the US entered into a bilateral free trade agreement which contains a significant chapter on intellectual property, including copyright, and requires Australia to implement various changes to its intellectual property laws to more closely align them with US intellectual property laws.

Most of Australia’s obligations arising out of the AUSFTA have now been incorporated into Australian law, and came into effect on 1 January 2005. The agreement however also contained various provisions regarding Australia’s obligations with respect to anti-circumvention legislation, which Australia is required to implement by 1 January 2007. In particular, the AUSFTA requires Australia to implement a definition of ‘TPM’ as stated in the text of the AUSFTA:

any technology, device, or component that, in the normal course of its operation, controls access to a protected work, performance, phonogram, or other protected subject matter, or protects any copyright.

20 ibid.; per Gleeson CJ, Gummow J, Hayne J and Heydon J at para 47
21 ibid.; per Kirby J at para 218
22 See; US Free Trade Agreement Implementation Act 2004
On one reading, this provision of the AUSFTA text would appear to negate the findings of the High Court in Stevens v. Sony in relation to the current anti-circumvention laws. However, libraries, cultural institutions and other ‘user’ groups in the copyright debate have argued that the agreement should rather be interpreted as ‘intending to protect access to copyrighted works which have been intentionally access protected by the rights holders of those works in order to protect copyright in those works, and to which the exceptions do not apply’.24

The context within which the AUSFTA text was agreed to would appear to support this approach. Australia agreed to implement the anti-circumvention provisions of the AUSFTA in the context of agreeing to implement international copyright standards which Australia had not yet ratified, particularly the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty which were adopted internationally in 1996, and which provide that:

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors [performers or producers of phonograms] 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 [performers or producers of phonograms] concerned or permitted by law (emphasis added).25

The basis of the AUSFTA and also US anti-circumvention law26 therefore stems from these international law obligations which clearly recognise the connection between TPMs and the exercise of rights-holders’ [copyright] rights.

Additionally, US law itself has held that a strict interpretation of the US Copyright Act27 ‘would lead to absurdities’,28 that the [US] Act ‘does not create a new property right for copyright owners’29 and that severance of ‘access’ from ‘protection’ is entirely inconsistent with the context defined by the total statutory structure of the Copyright Act.30 The US Courts have therefore interpreted US law in a manner consistent with the WIPO Copyright treaties, rather than extending copyright protection by conferring additional rights to copyright holders to control access to works in and of itself. It would be therefore be peculiar if Australia interpreted the AUSFTA in a manner that goes not only beyond its AUSFTA obligations, but also beyond any interpretation that the US has ascribed to those obligations.

Adoption of a reading of the AUSFTA that allows TPMs to control access to works regardless of whether such devices actually protect copyright, would be particularly peculiar given the consistent approach of domestic law-making bodies which have emphasised that ‘access’ to works lies outside of the scope of the rights provided by copyright.31 The most recent domestic review concerning this issue was conducted by

24 See the submission of the Australian Digital Alliance and the Australian Libraries Copyright Committee regarding the Review of Technological Protection Measures Exceptions: http://www.digital.org.au/submission/TPMsub.rtf at 8–10
25 WIPO Copyright Treaty, Article 11; WIPO Performances and Phonograms Treaty, Article 18; available online at: http://www.wipo.int/treaties/en/
26 See; Circular 92: Copyright law of the United States of America. This can be viewed online at: http://www.copyright.gov/title17/92preface.html
29 ibid.
30 ibid. at 40
31 For example, see: Copyright and Contract, Copyright Law Review Committee, Commonwealth of Australia, 2002
Digital Agenda Review Report and Recommendations, Attorney-General’s Department, 2004
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In summary, the High Court, via the Sony decision in October last year, solidified a clear position in relation to anti-circumvention laws in Australia. At the same time however, the Australian government has agreed with the US to ensure that its anti-circumvention laws comply with the AUSFTA before 1 January 2007. The government must now reconcile the two.

Conclusion

The concept of ‘balance’ is integral to copyright law. Copyright laws were founded on the principle that society would benefit if innovation, creativity, and advancement were facilitated by law. Such facilitation necessarily requires both protection of and access to copyrighted materials. The amorphous concept of ‘balance’ however, has proved difficult to translate into the mechanics of the law.

In the Sony decision, in the process of clarifying the current anti-circumvention provisions, the High Court gave important guidance on how to achieve balanced copyright law in the digital environment. The Court recognised the need to limit anti-circumvention laws in order to ensure that exceptions to copyright infringement can be accessed by users in the digital environment, and so that they are not overridden by default due to technological advancements. The Court identified the importance of the fair dealing provisions to the overall balance of rights provided by copyright, and reiterated that copyright laws should deal with copyright protection and not expand to protect other interests, such as market power, or indeed access rights.

For libraries and user interests, the decision provided an extremely welcome development, not to mention an important lobbying tool, in the midst of the AUSFTA related legislative changes which provided stricter copyright protection while failing to recognise the importance of educational and cultural institutions in carrying out their functions. The highest judicial body in this country has recognised the debilitating effects that over-protective copyright laws may have on these functions, and indicated that there are boundaries outside of which legislation brought before it under the guise of copyright will not be upheld.

In the near future however, the balance of rights entailed in our copyright legislation will be determined by the Parliament, in its implementation of the AUSFTA.

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33 ibid., at 51–90.