

BETWEEN

EDDY STEVENS

Appellant

AND

**KABUSHIKI KAISHA SONY COMPUTER
ENTERTAINMENT**

First Respondent

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**SONY COMPUTER ENTERTAINMENT
EUROPE LIMITED**

Second Respondent

**SONY COMPUTER ENTERTAINMENT
AUSTRALIA PTY LTD**

Third Respondent

**AUSTRALIAN DIGITAL ALLIANCE LIMITED AND THE AUSTRALIAN
LIBRARIES COPYRIGHT COMMITTEE -
(1) SUBMISSIONS FOR LEAVE TO BE HEARD AS AMICI CURIAE
(2) SUBMISSIONS ON THE APPEAL**

20 **PART I: APPLICATION FOR LEAVE TO BE HEARD**

1.1 By Summons filed 17 January 2005, the Australian Digital Alliance Limited (“the ADA”) and the Australian Libraries Copyright Committee (“the ALCC”) (jointly referred to as “the Applicants”) seek leave to appear as amici curiae at the hearing of this appeal.

1.2 The Applicants rely on the affidavit of Sarah Waladan of 17 January 2005, in support of the application. The ALCC is a representative body of Australian Libraries and Archives, formed for the purpose of dealing

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with copyright issues affecting those institutions. The special position of libraries and archives, in relation to dealings with works subject to copyright, is dealt with in Part III, Div 5 of the *Copyright Act 1968* (Cth). The ADA is a more broadly constituted organization which, in addition to representation of libraries and archives in Australia, also involves museums, bodies undertaking research and educational functions (including many universities and the CSIRO) and numerous other public institutions.¹ Like the ALCC, its focus is on matters relating to copyright.

10 1.3 The *Copyright Act* embodies a balance of conflicting public interests, broadly identified as involving the owners of intellectual property on the one hand and users of their intellectual works, on the other. The establishment and maintenance of a desirable balance is an issue of great importance in the intellectual life of the Australian community and operates in an international or global context. The operation of the law in relation to the varied interests of education, research, artistic performance and entertainment extend well beyond the commercial interests of the parties in the present proceeding. The Applicants seek to put submissions in relation to the legal issues raised by the parties,
20 as they affect the broader interests of their membership, and the large body of individuals who use or benefit from the activities of the institutions concerned.

1.4 The Applicants have been actively involved in the policy debates which preceded the enactment of the *Copyright Amendment (Digital Agenda) Act 2000* (Cth) (“the *Digital Agenda Act*”). In the Full Court in the present case, Lindgren J made specific reference to the submissions made by the ADA to the House of Representatives Standing Committee on Legal and Constitutional Affairs.² Given the purpose for which the

¹ See Affidavit, par 6.

² *Kabushiki Kaisha Sony Computer Entertainment v Stevens* (2003) 132 FCR 31 at [116]: AB 69(45). The work of the Committee is known as “the Andrews Report”.

Applicants were established, the interests of their members and their activities in relation to the on-going public and political processes with respect to the development of copyright law in a digital environment, the Applicants have:

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- (a) a legitimate interest in making submissions in relation to the statutory construction issues in this appeal, particularly in the context of the special nature of the *Copyright Act*, and in the particular context of the novel anti-circumvention provisions;
 - (b) special knowledge and expertise relevant to the issues the subject of appeal;
 - (c) an interest in the subject of litigation greater than a mere desire to have the law declared in particular terms;³
 - (d) an ability to make submissions which the Court might consider that it "*should have to assist it to reach a correct determination*",⁴ and
 - (e) an ability to make submissions which both differ from those of the parties and are likely to "*assist the Court in a way in which the Court would not otherwise have been assisted*".⁵

20 1.5 The Federal Court, both at first instance and on appeal, thought it appropriate to grant leave to the Australian Competition and Consumer Commission ("the ACCC") to appear as amicus curiae. Even if the ACCC repeats its application in this Court, the Applicants seek to make submissions which differ from those advanced by the ACCC in the Courts below.

1.6 The parties have received adequate notice of the intention of the ADA and the ALCC to seek leave to be heard. The proposed submissions are within the scope of the grant of special leave, the Notice of Appeal and the Notice of Contention, but address matters in addition to those

³ *Kruger v Commonwealth of Australia* (1996) 3 Leg Rep 14 per Brennan CJ.

⁴ *Levy v State of Victoria* (1997) 189 CLR 579 per Brennan CJ at 603.

⁵ *Ibid* at 604.

addressed by the parties, both on the grounds of appeal and on the contentions. Importantly, the issues are ones of statutory interpretation in a complex and evolving setting, and have important implications for the broader Australian community.

- 1.7 In brief, the concern of the Applicants and their members, outlined further in Part 2 of this submission, is that the combined effect of the submissions put on behalf of the Respondents will be to create in copyright owners a right to control the manner in which members of the public apprehend a work or other subject matter, extending well beyond the rights conferred by the *Copyright Act*.⁶ Thus, in a digital context, the right to control access will become a right to control all uses of copyright material, whether they would infringe copyright or not. Such an extension of rights has been called "drastic"⁷ and "unprecedented"⁸ by leading scholars.
- 1.8 Such broadening and strengthening of copyright holders' rights have implications far beyond the facts of this particular case. The Applicants have, by reason of their expertise and of the interests of their members, both of which they bring to bear in their activities in public debate on copyright in the digital environment, a legitimate interest in ensuring that arguments against construing the *Copyright Act* to grant such a level of control of access be heard in this Court. The principles applied in this case will significantly affect the rights of persons other than the parties to the appeal.⁹

⁶ See generally, Ginsburg, "From Having Copies to Experiencing Works: The Development of an Access Right in US Copyright Law" (2003) 50 *J Copyright Soc'y USA* 113 at 120 ("From Having Copies to Experiencing Works").

⁷ Cornish, *Intellectual Property: Omnipresent, Distracting, Irrelevant?* Clarendon Law Lectures, OUP (2004) at 58 ("Cornish, Clarendon Law Lectures").

⁸ Samuelson, "Intellectual Property and the Digital Economy: Why the Anti-Circumvention Provisions Need to be Revised" (1999) 14 *Berkeley Tech L J* 519 at 524, 542; Nimmer, "Brains and Other Paraphernalia of the Digital Age" (1996) 10 *Harv J L & Tech* 1 at 36-37.

⁹ *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520 at 534.

PART II : SUMMARY OF ARGUMENT

(1) **The first issue: Limits on right to control access**

2.1 The first construction issue concerns the definition of “technological protection measure” in s.10(1) of the *Copyright Act*. It was accepted by the primary judge that the Appellant breached s.116A(1)(a) of the *Copyright Act* if the device which he installed in PlayStation consoles in fact circumvented a “technological protection measure”. For the purposes of his Honour’s conclusions, it was not necessary at trial to determine whether the technological protection measure was the “access code” contained on PlayStation CD-ROMs, the Boot-ROM which read and verified the access code, or a combination of those two features. On the approach adopted in the Full Court, that question became significant if so much of the PlayStation console that is a computer program¹⁰ could be lawfully reversed-engineered (as was held, under US law,¹¹ by the Court of Appeals for the Ninth Circuit, in *Sony Computer Entertainment Inc v Connectix Corporation*¹²) so as to make possible the existence on the market of an alternative console to Sony’s PlayStation console.

2.2 The key elements of the definition of “technological protection measure”, for present purposes, are identified as follows:

technological protection measure means a device ... that is designed, in the ordinary course of its operation, to prevent or inhibit the infringement of copyright in a work ... by either or both of the following means:

¹⁰ Justice Sackville described the PlayStation console at [42], and in that description the only part that could be a computer program is the “read-only memory (ROM) based internal operating system”, which then appears to be always referred to as the ‘Boot-ROM’. In the *Sony v Connectix* case, the US Court of Appeals for the Ninth Circuit described the PlayStation console as containing “both (1) hardware components and (2) software known as firmware that is written onto a read-only memory (ROM) chip. The firmware is the Sony BIOS.” Relevantly, that Court continued: “Sony has a copyright on the BIOS. It has claimed no patent relevant to this proceeding on any component of the PlayStation.”: *Sony Computer Entertainment Inc v Connectix Corporation* 203 F.3d 596 (2000) at 598.

¹¹ Cf s.47D of the *Copyright Act*.

¹² 203 F.3d 596 (2000): Cert denied *Sony Computer Entertainment Inc v Connectix Corporation* 531 US 871 (2000).

- (a) *by ensuring that access to the work ... is available solely by use of an access code ... with the authority of the owner ... of the copyright;*
- (b) *through a copy control mechanism.*

10 In substance, the point of departure between the primary judge on the one hand and the majority in the Full Court on the other turns on the work given to the concept set out in the opening part of the definition, being the prevention or inhibition of infringement of copyright. The legislative history of the *Digital Agenda Act* suggests that that element should be given a central role in reading the definition as a whole. On that basis, control of access should not be seen as a right conferred on the copyright owner, but as a mechanism which, when properly adapted to the purpose of protection against infringement, may not be attacked by the making, sale or distribution of circumvention devices.

2.3 While Parliament recognised that copyright owners should be able to deny access to a copy of a work,¹³ the distinction between this right, and the right to control *each individual apprehension or use* of a work is important. It has been succinctly explained by Professor Jane Ginsburg:¹⁴

20 *“Suppose that I download copyrighted songs or documents from an authorized Web site. Suppose also that to hear the songs or read the documents, I must register with the copyright owner, using the modem in my computer. In turn, the copyright owner communicates a password. A technological measure included in the download recognizes my password, and my computer. Thenceforth, when I wish to hear the song or read the document, I must enter my password, and listen to or view it on the same computer; I cannot use my downloaded copy of the song or document on another computer.*

30 *By making the authorized download, I have acquired lawful access to a copy of the work. ... The hard drive (or free-standing disk) on which the download was received is a*

¹³ See also Weatherall “On Technology Locks and the Proper Scope of Digital Copyright Laws – *Sony* in the High Court” (2004) 26 Syd L Rev 613 (“On Technology Locks”) at 626.

¹⁴ From Having Copies to Experiencing Works at 126.

material object. But the physical object 'copy' is distinct from the incorporeal 'work of authorship' that the copy embodies, and I do not access 'the work' until I have entered the password (from the correct computer). Thus, 'access to the work' becomes a repeated operation; each act of hearing the song or reading the document becomes an act of 'access'."

2.4 In accordance with the historical policy underlying the law of copyright, copyright owners have a publication right, which allows them to determine when their works first become available,¹⁵ and a right to make,¹⁶ and sell,¹⁷ copies of a copyright work. When Parliament enacted the *Digital Agenda Act*, it intended that copyright owners should have an analogous right in the digital environment. It did so by creating a right to communicate works to the public online,¹⁸ and by provisions controlling the creation and distribution of devices which would enable users to circumvent protections placed by copyright owners on copies of works. The legislative history is at least not inconsistent with the restrictions on access (now paragraph (a) of s.116A) being intended as controls over access to online materials.¹⁹ 'Access' would be able to be controlled to prevent or inhibit the

¹⁵ Section 31(1)(a)(ii) (literary, dramatic and musical works), (b)(ii) (artistic works) of the Act, interpreted by Australian courts as meaning the right "to make public that which has not previously been made public in the copyright territory": *Avel Pty Ltd v Multicoin Amusements Pty Ltd* (1990) 171 CLR 88 at 93. Arguably, the roots of this right in concerns akin to moral rights can be seen by the fact that no equivalent rights exist in relation to Part IV subject-matter.

See also in the US, *Harper & Row, Publishers, Inc v Nation Enterprises* 471 US 539, 555 (1985) (referring to "the author's right to control the first public appearance of his undissemated expression"); in the UK, s.18 of the *Copyright, Designs and Patents Act* 1988.

¹⁶ Section 31(1)(a)(i) and (b)(i) of the Act. And see ss.85(1)(a), 86(a), and 87(a) of the Act.

¹⁷ Section 38 of the Act.

¹⁸ Section 31(1)(a)(iv) and (b)(iii) of the Act. And see ss.85(1)(c), 86(c), and 87(c) of the Act.

¹⁹ For example, see 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 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". On the legislative history, see also Lindgren J at [92]-[126]: AB 58(35)-74(20), and cf On Technology Locks at 631: "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."

infringement of copyright at the time of apprehension or other use of the work, or at a subsequent time, but not at an earlier time.

- 2.5 Had the Government intended to create a right to control access generally through the *Digital Agenda Act*, it had the opportunity and the precedent. Indeed the Government was pressed to provide protection for all devices that 'control access' – a proposed definition of “technological protection measures” put forward by the International Intellectual Property Alliance (“the IIPA”) was:²⁰

10 “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.”

This proposal mirrored the provision in the US *Digital Millennium Copyright Act* (“the DMCA”)²¹ which, by the time the *Digital Agenda Act* was enacted (in 2000), had been in force for two years. The IIPA proposal was *not* accepted: rather Parliament chose to focus on protection from *infringement*.²²

- 20 2.6 Australia’s implementation of the WIPO treaties has been seen as “favouring the use of protected works”;²³ that is, as controlling infringement rather than access. Those treaties provide scope for countries to adopt different definitions of 'effective technological measures'. It is clear that Australia took a position less protective of circumvention devices than the position taken in other jurisdictions, such as the US and the UK.²⁴

²⁰ IIPA, Submission to House of Representatives, Standing Committee on Legal and Constitutional Affairs, Commonwealth Parliament, 7 October 1999, at 5.

²¹ 17 USC §1201.

²² On Technology Locks at 631, and see generally Lindsay, "A Comparative Analysis of the Law relating to Technological Protection Measures" (2002) 20 *Copyright Reporter* 118.

²³ Kerr et al, "Technological Protection Measures: Tilting at Copyright's Windmill" (2002-2003) 34 *Ottawa LR* 7 at 58.

²⁴ Digital Millennium Copyright Act 1998 (US), 17 U.S.C. 1201; UK Copyright and Related Rights Regulations 2003, Clause 24, amending ss.296, 296ZA, 296ZB, 296ZD and 296ZF.

2.7 The aim of the *Digital Agenda Act* was to extend current rights provided in the print environment into the digital environment, but not to provide extensive additional rights which are not provided in the print environment.²⁵

2.8 In determining the correct approach to the construction question, it is necessary to pay careful attention to the different circumstances in which copyright may be infringed and may, accordingly, require protection. Thus, in relation to material subject to copyright available on the internet, 'access' not authorised by the copyright owner will involve infringement of the copyright.²⁶ Use of an access code in such a circumstance may well constitute a technological prevention measure. The situation changes once the user has lawfully obtained a copy of the work. Multiple 'access' (acts of apprehension of the work) by the purchaser will no longer constitute an infringement of copyright. The same maybe said of access to a copy of the work which is obtained otherwise than electronically. Because multiple use, and even copying which constitutes fair dealing, may occur without infringement of copyright in such circumstances, a device which prevents or inhibits such conduct, without reference to whether the conduct involves an infringement of copyright or not, should not be characterised as a device that is "designed ... to prevent or inhibit the infringement of copyright".

2.9 If the definition of technological protection measures were to be read expansively, to include devices which are designed to prevent access to material, with no inherent link to infringement, and thus only inhibit infringement indirectly (in the present case, by creating in the minds of infringers who have knowledge of Sony's mechanism an awareness

²⁵ Revised Explanatory Memorandum to the Copyright Amendment (Digital Agenda) Bill 2000 (Cth) ("Revised EM") 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".

²⁶ See generally, "On Technology Locks" at 626.

that any copies of PlayStation games they might make may not necessarily yield intended results), it will expand the ambit of the section to such an extent that it will interfere with Div 3 of Part III of the Act, and alter the balance which has been struck by the Parliament.

- 10 2.10 The Respondents' device²⁷ does not prevent infringement. It prevents access to the work (the PlayStation game), either when the work has already been copied (with or without an act of infringement having taken place), or when the work is coded for regional access and access is attempted outside that region, in each case, if (but only if) access is attempted on a Sony PlayStation console. The approach of the Full Court removes without justification, from the definition of technological protection measures, the requirement that the access limitation be designed to stop infringement. Here the access limitation occurs after the infringement and is only achieved by preventing access on a Sony console, not necessarily or invariably the machine which will be used.²⁸
- 20 2.11 Division 3 of Part III of the Act (particularly ss.40-42, 44) sets out uses that are exempted from copyright infringement. The provisions enable users to copy copyright materials without seeking the prior permission of the copyright holder, and without paying any fee. In relation to digital works subjected to protection measures, fair dealing rights as set out in Div 3 of Part III will be severely affected if such measures cannot be lawfully circumvented.²⁹ It is no answer to point to s.116A(3), which

²⁷ It appears that Sony has now decided that the device is the combination of the access code and the Boot ROM, and has abandoned the other two possibilities. Sony's submissions at [11] fn 1, [21], [30].

²⁸ As to alternative PlayStation consoles, see *Sony Computer Entertainment, Inc v Connectix Corporation* 203 F.3d 596 (2000) (*Sony v Connectix*), where the US Court of Appeals, Ninth Circuit found that the respondent's Virtual Game Station, consisting of software that emulated on a personal computer the PlayStation console (by emulating the functionalities of both the hardware and firmware of the console), thus allowing PlayStation games to be played on a personal computer, had not been made by infringing Sony's copyright in the firmware (BIOS) of the console. The respondent had reversed-engineered that firmware, for the purposes of making the program that constituted the Virtual Game Station. Cert denied, *Sony Computer Entertainment, Inc v Connectix Corporation* 531 US 871(2000).

²⁹ See generally Dellit and Kendall, "Technological Protection Measures and Fair Dealing: Maintaining the Balance between Copyright protection and the Right to Access information"

deals with supply of circumvention devices (or services) to a person for a permitted purpose, because fair dealing is not a 'permitted purpose'. There will be other unintended consequences.³⁰

10 2.12 The Respondents' interpretation of s.116A, without a balance being provided by other provisions of the Act, will enable rights holders to opt out of the fair dealing scheme. This would have the consequence of 'locking up' a broad range of material from lawful dealings. Contract will become the measure of what is permitted, rather than what is provided by the *Copyright Act*.³¹ Institutions might be required to pay copyright holders to unlock material, a development that would be inconsistent with the purpose of the fair dealing provisions, and would change the balance between rights of owners and rights of users, and of the Australian community more generally. An additional (and unintended) burden will be placed on libraries and other cultural institutions to enter into licences and pay for access to all fair dealing material, defeating a significant purpose and benefit of having materials available online.³²

(2) Issue 2: Reproduction in a RAM

2.13 On the Respondents' argument, all copies of a work in a digital medium, however temporary, should be treated as "reproductions in

(2003) 4 *Digital Tech LJ* 1 (TPM and Fair Dealing), and in particular concluding paragraphs [204]-[212].

³⁰ See generally TPM and Fair Dealing at [92]-[93], and references therein cited; Vinje, "Copyright Imperiled? Will Copyright Survive the Advent of Electronic Contracting and technical Measures of Control?" (1999) 2 EIPR 192 at 11; Gasaway, "The New Access Right and its Impact on Libraries and Library Users" (2003) 10 J Intell Prop L 269, Part IV – Impact on Libraries and Library Users, sections D (Fair Use) and E (Locking up Public Domain Materials).

³¹ See generally submission of the Australian Vice-Chancellors' Committee to the Copyright Law Review Committee Reference on Copyright and Contract, "Annexure C – The *Digital Agenda Act*. How the new copyright law (and contract) is redefining the relationship between users and owners of copyright", which can be found at:

http://www.ag.gov.au/agd/www/Clrhome.nsf/page/Past_Inquiries_Submissions

³² See Kenyon and Hudson, "Copyright, Digitisation and Cultural Institutions", University of Melbourne & IPRIA Occasional Paper No 3/04 (2004), at 9: "The whittling away of circumstances in which digitization is permitted ... appears to force cultural institutions to obtain licences to undertake many fundamental activities. ... The increased need to obtain licences appears likely to give copyright owners more power to negotiate restrictive terms."

material form” and hence subject to the exclusive authorisation of the copyright owner. As Sackville J noted:³³

“This issue is of considerable importance and has generated much debate partly because of the potential ramifications for users of the Internet. Web browsers function by downloading material from a site into the RAM on a user’s computer, thus permitting the material to be displayed on the screen.”

In other words, each act of online access to copyright material involves the making of a copy, or the making of a series of transient copies of parts of the material, in the RAM.

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2.14 The Respondents say that "there is nothing on the face of the [Explanatory] Memorandum to limit the circumstances in which RAM constitutes a material form".³⁴ But the effect of their interpretation is to lead ineluctably to a right to control each and every individual act of apprehending a copyright work in a digital context. It would be analogous to giving copyright owners the right to control how many times a purchaser may read a book, play a CD, or view an artwork.³⁵ Many commentators have noted the radical and extreme nature of such a construction. Professor Cornish has commented, in his recent Clarendon Law Lectures, that it would be a "drastic ... blanket of liability".³⁶

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2.15 Members of the ADA and the ALCC have a vital concern regarding the existence of such a right of control. The interpretation urged by the Respondents is:

- (a) contrary to basic copyright principles and history;
- (b) inconsistent with the Government’s explicit aim of ensuring that the technical processes which form the basis of the operation of new technologies are not jeopardised;

³³ Judgment at [120].

³⁴ Respondents’ submissions at [47].

³⁵ See generally Litman, "The Exclusive Right to Read" (1994) 13 *Cardozo Arts & Ent L J* 29.

³⁶ Cornish, *Clarendon Law Lectures* at 58.

- (c) inconsistent with legislative history;
- (d) not required by the international legal history concerning the reproduction right, and
- (e) likely to lead to anomalous results.

These points will be addressed in turn.

- 2.16 The interpretation urged by the Respondents is contrary to the concept of a balance of owners' and users' rights which is a fundamental part of copyright law.³⁷ Historically, in a non-digital environment, copyright owners have not had a right to control each and every use of a work. Accepting that the balance of rights is not immutable,³⁸ it is clear that in the context of the *Digital Agenda Act*, Parliament sought to preserve the existing balance so far as possible.³⁹ An interpretation which would lead to a drastic expansion of copyright owners' rights was not intended.
- 2.17 The Respondents say that the definition of material form "is intended to provide as wide as possible a definition of physical fixation".⁴⁰ There is, however, a simple explanation for the 1984 amendment to the definition of 'material form'. The provision was introduced specifically to deal with an issue, live after the decision of Beaumont J at first instance in the case of *Apple v Computer Edge*,⁴¹ that a copy of copyright material in electronic forms of storage (or magnetic forms) did not have sufficient 'objective similarity' to the original work for the purpose of copyright law, and hence was not a 'reproduction'. Accordingly, the 1984 definition envisaged an electronic storage from which material can be 'called up' and then viewed or further used.

³⁷ *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339 at [10] (Supreme Court of Canada); *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 205 ALR 1.

³⁸ Lindsay, "A Comparative Analysis of the Law relating to Technological Protection Measures" (2002) 20 *Copyright Reporter* 118 at 119.

³⁹ Revised EM at 2.

⁴⁰ Submissions at [46].

⁴¹ In the High Court, *Computer Edge Pty Ltd v Apple Computer Inc* (1986) 161 CLR 171.

- 2.18 The Respondents' interpretation of 'material form' is also inconsistent with historical principles in copyright law. The historical form of copyright has been to grant copyright owners, not an 'umbrella' right to control every form of use of their works, or even every kind of commercial use of their works, but rather certain defined exclusive rights (such as, for example, those set out in s.31 of the *Copyright Act*). This contrasts with the *Patents Act*, which has historically granted very broad rights to exploit patented inventions.⁴²
- 2.19 The Respondents' interpretation is also inconsistent with the Government's express aim, through amendments made by the *Digital Agenda Act*, of "ensuring that the technical processes which form the basis of the operation of new technologies such as the Internet are not jeopardised".⁴³ If every single reproduction in a RAM, however temporary, incidental, evanescent and ever-changing, and whether or not able to be reproduced further, falls within a copyright owner's rights, use of the many digital technologies which require the making of copies will be jeopardised, or at the least made more difficult. There are frequent references, through the history of the many Acts amending copyright law in the last few years, to the Government's desire to avoid copyright intruding unduly into the private sphere.⁴⁴ But it is the necessary outcome of the interpretive approach put forward by the Respondents that many individual or private acts will be infringements,

⁴² *Patents Act* 1990 (Cth), s.13(1) and dictionary.

⁴³ *Revised Explanatory Memorandum to the Copyright Amendment (Digital Agenda) Bill* 2000 (Cth) at [68]. This specific comment was directed to explaining the exception in the new s.43A. It is clearly illustrative, however, of an intention not to jeopardize, through ordinary copyright law, the operation of all the new technologies; the Internet is there given as an example.

⁴⁴ See, for example, Attorney-General's Department, Government Response to the Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, "Cracking Down on Copycats: Enforcement of Copyright in Australia", available at <<http://www.law.gov.au>> (stating that banning use of circumvention devices would be "an unnecessarily heavy-handed intrusion into the private sphere"); see also frequent statements, in the Explanatory Memorandum to the *US Free Trade Agreement Implementation Act* 2004 (Cth), that "the Government's policy [is] that the copyright law should not unduly intrude into the private sphere": at [591], [595], [597], [599], [601], [603], [605], [607], [642], [646], [648], [650], [652], [654].

including playing unauthorised copies or even viewing works online which are not known by the viewer to be unauthorised copies.

- 2.20 The Respondents' interpretation is not required by the international legal history of the reproduction right. In 1996, when the WIPO Copyright Treaty was agreed, the international community at the negotiations *rejected* a specific provision that would have given copyright owners the exclusive right to authorise 'direct and indirect reproduction of their works, whether permanent or temporary, in any manner or form'.⁴⁵ That is, it rejected an exclusive right in respect of all temporary copies within the reproduction right. It was recognised that this would have been an unacceptable extension of copyright owners' rights to control material. The issue remains controversial at an international level.
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- 2.21 One may compare and contrast those laws which accept that temporary copying may constitute an infringement of copyright, which have been accompanied by the creation of new exceptions. In Europe, an exception for "incidental uses" was the only exception made mandatory on all European countries.⁴⁶ Australia only created such exceptions with the passing of the *US Free Trade Agreement Implementation Act* 2004 (Cth) (new s.43B). If consistency with other jurisdictions be an important guiding factor,⁴⁷ one would reject the proposed construction of the *Copyright Act*.
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- 2.22 The Respondents' interpretation is likely to lead to anomalous results in terms of the imposition of liability for acts done in relation to copyright material, particularly where, in the digital environment, it can be argued that works that are computer programs are also, or also 'embody' or

⁴⁵ See Samuelson, "The US Digital Agenda at WIPO" (1997) 37 *Va J Int'l L* 369 at 387-392.

⁴⁶ *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, Art 5.1.

⁴⁷ See Respondents' submissions, heading to paragraphs 34-37.

give rise to in their execution, other subject-matter.⁴⁸ The facts in *Australian Video Retailers Association Ltd v Warner Home Video Pty Ltd*⁴⁹ provide an example. If it were accepted, the Respondents' argument would mean that consumers infringed copyright when they played a rented DVD. The consumers would not know they were infringing copyright, but they would be, on this argument, by using the DVD. Further, the video retailer would be liable for authorising infringement by the consumer. Where 'temporary copy' provisions are expanded, intermediaries are targeted for 'authorising' such infringements.⁵⁰

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2.23 These results are anomalous and suggest the construction argument which leads to them is flawed.

(3) Third Issue: Copy of a film

2.24 The third issue is whether the playing of the PlayStation game on the PlayStation console involves the making a copy of the whole or a substantial part of the film, within the meaning of the *Copyright Act*. Again, what constitutes a 'copy' of a film has significant implications beyond the immediate circumstances of to this case.

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2.25 On the Respondents' argument, there need be no article or thing (such as celluloid or magnetic tape) which can be taken in one's hand and used from time to time⁵¹ for there to be a 'copy' of a film under s.86(a)

⁴⁸ On this point, see further submissions below on the third issue.

⁴⁹ (2001) 53 IPR 242.

⁵⁰ The copyright owners in that case were seeking to have recognised a rental right through their construction of the definitions of 'copy' in relation to a cinematograph film and 'computer program' in s.10 and of ss.21(6) and 24 of the *Copyright Act*, where none existed before. Section 31 of the *Copyright Act* creates a rental right for sound recordings and computer programs, but for nothing else. See also *Microsoft Corporation v Business Boost Pty Ltd* (2000) 49 IPR 573 (seller of computers with pre-loaded software argued to be liable for infringements allegedly occurring when computer purchasers ran the computer program). Another example is the famous US case, *MAI Systems Corp v Peak Computer, Inc* 991 F.2d 511 (9th Cir, 1993), in which the right sought to be created was, in effect, an exclusive right to service computer systems.

⁵¹ See Lindgren J at [183]: AB 92(50).

and s.10(1). It follows that every time a Sony PlayStation game is played (or every time a DVD is played), a licence will be required.

2.26 But the argument reaches far more broadly. Most acts of access to moving images via a digital device, like a computer ('visual images', on the reasoning of *Galaxy Electronics Pty Ltd v Sega Enterprises Ltd*⁵²) involve 'embodiment', in the sense argued by the Respondents, in some form of temporary computer memory. For example, in the use of a personal computer to view a film streamed from a site online, small parts of the film are temporarily stored in RAM acting as a 'buffer', even if no permanent copy is downloaded to the hard-drive of the computer. On the Respondents' argument, this storage in RAM would involve the making of a copy of a film (or a substantial part of a film).

2.27 Ordinarily, one would expect that an implied license would excuse such incidental copies. However, it is not hard to imagine cases where this would not be so. For example, where a user in Australia is watching a film streamed by a German copyright owner from a site hosted in Germany, but copyright in the film is owned, in Australia, by someone other than the German copyright holder; or the right to communicate the film to the public is owned by someone other than the person who owns the right to make copies of the film, a communication that does not otherwise constitute an infringement of copyright will lead to the creation of infringing copies by the user who is simply watching the streamed film.

2.28 The examples show that acceptance of the Respondents' interpretation would lead to the creation of a broader right of control, with significant implications for the rights of the public. Further, the interests of members of the ADA and the ALCC would be directly affected. This is

⁵² (1997) 37 IPR 462 (*Galaxy v Sega*), accepting the reasoning at first instance of Burchett J in *Sega Enterprises Ltd v Galaxy Electronics Pty Ltd* (1996) 35 IPR 161. Special leave to appeal was applied for, but the case appears to have settled before the application was heard.

because copyright owners could seek a separate licence each time a library user views a digital copy of a film.⁵³ This in turn could lead to a demand that a separate fee be paid. There is no equivalent, in respect of films, to the exceptions in s.49 of the *Copyright Act* which allow libraries to supply copies of articles to library patrons.

- 2.29 Given these broader effects, the correct approach to interpreting the meaning of 'copy' of a cinematograph film is that is supported by Ricketson and Creswell,⁵⁴ and accepted by the majority in the Full Court.
- 10 2.30 The suggestion by the Respondents,⁵⁵ that Sackville J had accepted that the loading of the code into RAM did amount to embodiment of the visual images forming part of a film is incorrect. At the highest, Sackville J considered it a possibility that certain visual images might have been 'embodied' in the RAM.⁵⁶ But 'embodiment' is only part of the definition of 'copy' in respect of film under the *Copyright Act*, which requires that there be an 'article or thing in which the visual images or sounds comprising the film are embodied'. Justice Lindgren's reasoning addressed the further question of whether there is an article or thing: his Honour concluded there is not.⁵⁷
- 20 2.31 In any event, the Respondents' arguments depend on the applicability of the reasoning in *Galaxy v Sega* to the PlayStation games. That is, to succeed the Respondents must:
- (a) establish that *Galaxy v Sega* was correct in concluding that a computer program which, when executed, generates visual images, is a film as well as being a 'computer program'; and

⁵³ And possibly, each time a user listens to a digital copy of a sound recording.

⁵⁴ Ricketson and Creswell, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (LBC Looseleaf) at [8.55].

⁵⁵ At [66].

⁵⁶ Judgment at [152] and [157]-[158].

⁵⁷ At [181]-[186]: AB 92(25)-93(35).

(b) overcome the concerns expressed by Sackville J in applying the reasoning in *Galaxy v Sega* to the PlayStation games.

2.32 As to the first matter the correctness of *Galaxy v Sega* has not been considered by this Court. It is not self-evident that a computer program is an embodiment of visual images as required by the definition of film in s.10(1). Nor is itself-evident that 'embodiment' would be satisfied by the application of the terms of s.24.

10 2.33 Further, as has consistently been recognised by the courts,⁵⁸ the definitions of Part IV "subject-matters" need to be applied with care. The reasoning in the *Galaxy v Sega* should not be assumed to be correct, in the absence of full argument on the point. This case, given the limitations of the evidence and factual foundations, is an unsuitable vehicle to address that question.

20 2.34 As to the second matter, Sackville J doubted that Sony had established a sufficient factual basis.⁵⁹ From the judgment it appears there was no evidence before his Honour on the mechanism by which visual images are said to be embodied in the computer program. Sackville J was only prepared to *assume* the equivalence of facts to, and thus the application of, *Galaxy v Sega*, finding against the Respondents on other grounds.

2.35 The question of whether a computer program that, when executed, produces visual images, is a film is an important question of law which may impact widely on many parties other than those to this appeal.

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⁵⁸ Most recently, by this Court in *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 78 ALJR 585.

⁵⁹ Judgment at [157].

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