

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 -
SUBMISSIONS ON THE MEANING OF "ACCESS"**

- 20 1. By leave granted on 8 February 2005,¹ the Australian Digital Alliance Limited and the Australian Libraries Copyright Committee make the following supplemental submissions on the meaning of the term 'access' in paragraph (a) of the definition of "technological protection measure" in section 10(1) of the *Copyright Act* 1968.
2. As previously submitted,² the legislative history, whilst not entirely consistent and comprehensive, tends to support the view that restrictions on access were intended as controls over access to online

¹ [2005] HCA Trans 030, line 4140.

² See eg written submissions of the amici at [2.4].

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materials. Whilst not conclusive of how the provisions should be construed, it lends support to the construction advanced below, namely that access does not generally encompass 'use'. However, it is sufficient for present purposes if "access" extends to any access which would permit unauthorised reproduction or copying.

3. The term "access" is used twice in the definition of "technological protection measure". It is used in the phrase "access to the work or other subject matter" and in the phrase "access code". In the latter phrase, it clearly means something of the nature of a password, provided by the copyright owner to an authorised user. (The user need not, of course, know what the password is.)
4. In terms of its structure, the definition incorporates both an objective (the prevention or inhibition of infringement) and functions, or mechanisms, whereby the objective may be achieved (pars (a) and (b)). The two mechanisms may operate separately or together, but they are logically independent. In order to create a reproduction (of a work) or a copy (of Part IV subject-matter) one logically requires access to the work or subject-matter. Accordingly, pars (a) and (b) can be seen as operating sequentially.
5. Access may, but need not, involve some apprehension of the work. One can obtain a copy of a work, be it a book or computer program, without using it in any way. It makes sense to say that a person has access to books in his or her library, even when they remain unopened on the shelves. In that sense, access connotes a legal entitlement, or a physical ability, to apprehend a work, or possibly both.
6. Similarly, apprehension need not be synonymous with access. In some circumstances, apprehension and access will coincide. That will be true of a work available on a website, which cannot be copied or "downloaded". Conversely, an individual who has a copy, in electronic form, in his or her possession, may not be able to apprehend it without

an appropriate machine. In the latter case, if the holder of the copy can make an identical reproduction, the holder has access to the work. If there is a mechanism which renders such a copy of limited value, that mechanism may be said to discourage the making of the copy,³ but it does not control access to the computer program.

7. In relation to a computer program, and in the context of the definition of a device which is designed to prevent or inhibit infringement of copyright in a work, the concept of “access to the work” must include forms of access which would allow infringement. As there can be no doubt that a reproduction of a computer program (without authority) is an infringement, the ability to copy in such circumstances must involve “access to the work” even if there is no immediate ability to apprehend the work. It follows that the inclusion of the access code in the present case cannot be said to “ensure” that access to the work is available “solely by” use of the access code.
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8. A similar construction has been adopted in the USA. Thus, in *Lexmark International Inc v Static Control Components Inc*,⁴ the Court of Appeals (Sixth Circuit) considered the use by the plaintiff of a microchip in its toner cartridges which prevented cartridges manufactured by third parties being used in its printers. The effect of the chip was to prevent use of the printer engine program (in which Lexmark held copyright), in order to make the printer operate. Relevantly, the DMCA prohibits the circumvention of a “technological measure which effectively controls access to a work protected” by copyright.⁵ The Court of Appeals rejected Lexmark’s claim that the access code (or authentication sequence) “controls access” to the program. The Court held:⁶
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³ One key issue remains whether “inhibit” extends to discouragement of prospective infringement.

⁴ 387 F.3d 522 (6th Cir 2004) at 545-547.

⁵ *Lexmark*, at p.545.8 (col 1).

⁶ *Ibid* at 546.7 (col 2).

“It is the purchase of a Lexmark printer that allows ‘access’ to the program. Anyone who buys a Lexmark printer may read the literal code of the printer engine program directly from the printer memory, with or without the benefit of the authentication sequence, and the data from the program may be translated into readable source code after which copies may be freely distributed. . . .

10 *The authentication sequence, it is true, may well block one form of ‘access’ – the ‘ability to ... make use of’ the printer engine program by preventing the printer from functioning. But it does not block another relevant form of ‘access’ – the ‘ability to [] obtain’ a copy of the work or to ‘make use of’ the literal elements of the program (its code).”*

As the Court noted, its conclusion was consistent with that reached by the Federal Circuit in *The Chamberlain Group, Inc v Skylink Technologies, Inc*,⁷ a case involving a computer program embedded in a garage door opener.⁸

9. Nevertheless, the Court recognised in *Lexmark* that:⁹

20 *“In the essential setting where the DMCA applies, the copyright protection operates on two planes: in the literal code governing the work and in the visual or audio manifestation generated by the code’s execution. ... In the cases upon which Lexmark relies, restricting ‘use’ of the work means restricting consumers from making use of the copyrightable expression in the work.”*

10. These latter cases, in the view of the Court in *Lexmark*, depended on the fact that the expression of the computer program itself constitutes a

⁷ 381 F.3d 1178 (Fed Cir 2004).

⁸ *Lexmark*, at 547.8 (col 1).

⁹ *Ibid* at 548.6 (col 1).

“work” separate from that constituted by the program.¹⁰ This conceptual duality appears to reflect a time when there were doubts as to whether a work in digital form, not directly perceptible to human senses, was fixated, or in material form, and hence protected at all. However, a suggestion that there are, in effect, two works to which one has access by having access to a computer program is not reflected in the analysis in the present case. If it were, there would need to be a separate consideration of the originality of both the computer program and the perceptible expression of the contents of the program. These issues have not been addressed. Accordingly, the distinction in *Lexmark* should not be adopted in Australia without proper consideration, by a trial court in the first instance.

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11. If the analysis at par 7 above is correct, it may not matter whether the concept of “access to the work” encompasses any act which involves apprehension of the work. At the very least, that question does not arise in the present case.

12. Further, it would appear that the question of construction in relation to the phrase “access to the work or other subject matter” may not arise at all in the present case. That which is said to be “inhibited” is the making (and sale) of unauthorised copies of games. Here, the device by which infringement is said to be discouraged is the combination of the access code on the game and the mechanism in the boot-ROM contained on the Playstation console, which prevents unauthorised copies being played on an unmodified console. The circumvention device allows the playing of an infringing copy (or a copy from another region) by overriding the instruction contained in the boot-ROM on the console. However, if the relevant operation of the TPM is to discourage copying, arguably it must constitute a “copy control mechanism” within par (b) of the definition, rather than a device which ensures that access to the

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¹⁰ 17 USC § 1201(a) uses the phrase “access to a work protected under this title”.

work is available solely by use of a code. However, no part of Sony's argument in the present proceedings was addressed to par (b).

13. The Respondent's alternative argument, namely that there is reproduction of a substantial part of the computer program of the game on the RAM, when it is played, also identifies the operation of the measure as a copy control mechanism.¹¹ Curiously, not only was there apparently no reliance on par (b) before his Honour in this context, but the precise nature of the TPM was not identified by the Respondents at that stage.

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Conclusions

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14. A purposive construction of the phrase "access to the work or other subject-matter", in par (a) of the definition of "technological protection measure" requires that controlling effect be given to the intention that the measure must be designed to prevent or inhibit the infringement of copyright in the work or other subject-matter. Any form of unauthorised access which would permit reproduction, copying or other infringement will be covered. Accordingly, if a work can be copied without use of an access code, the relevant mechanism does not operate "by ensuring that access ... is available solely" by use of that code. The fact that some forms of access, in some circumstances, may involve use of the access code is not sufficient.
15. The separate identification of copy control mechanisms in par (b) is consistent with the conclusion that any access which would permit copying is sufficient to constitute access for the purposes of par (a).
16. The additional contention, that "access" does not in any event extend to "use" of the work, is consistent with the ratio of the US Court of Appeals in *Lexmark*, which should be applied in relation to the scope and purpose of the equivalent provisions in the *Copyright Act*, though it is

¹¹ See judgment of Sackville J at [30]: AB (Full Court) 161.

not consistent with the attempt to distinguish a number of US District Court decisions, which should not be applied.

- 17. That contention is also consistent with the emphasis given by the US Court of Appeals (Fed Cir) in *The Chamberlain Group, Inc v Skylink Technologies Inc*¹² to the importance, as a matter of principle, of confining the operation of technological protection measures to the protection of copyright. A similar policy may be divined in Australia, not only from the chapeau to the definition of “technological protection measure”, but also from the reference, in s.116A(1)(a) of the *Copyright Act*, to a work being “protected by” such a measure.

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¹² Footnote 7, supra.