

**HOW A NORWEGIAN TEENAGER, A ‘MESSIAH’ AND A MAN FROM KENSINGTON
ARE PUSHING THE LIMITS OF COPYRIGHT**

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ABSTRACT

[41] Australia, the United Kingdom and the United States have each introduced provisions to give legislative force to technological protection measures. This article analyses the legislation as it has been interpreted in three cases — one in each jurisdiction. Despite the legislation and the decisions, or perhaps because of them, the ability for copyright owners to protect material, particularly on a global basis, is still uncertain. Further uncertainty exists due to the creation of new rights in some jurisdictions and the imposition by the legislation on traditionally ‘legitimate’ use of copyright works.

Whilst each jurisdiction has sought to implement the key elements of the WIPO Copyright and Performances and Phonograms Treaties, the lack of detail in those Treaties has allowed for the introduction of a variety of legislative provisions. The distinction between the levels of protection granted becomes blurred where protection technologies are combined. The effect of those technologies has also suffered from differing judicial interpretation and understanding.

[42] **Introduction**

The use of technological protection measures (TPMs) to protect copyright material is increasing rapidly. Increasing at seemingly the same rate is the use of devices that are able to circumvent these measures. In order to break this trend, TPMs require the support of legislation.² The United States, United Kingdom and Australia have each introduced legal protection to give added force to TPMs. However as one commentator has said: ‘Reading the provisions of these different laws is a chore one would not inflict even on one’s worst enemies’.³

For this reason, this paper will analyse these provisions in the context of three cases that have been heard in each jurisdiction. The cases demonstrate differing approaches

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² S Fitzpatrick, ‘Copyright Imbalance: US and Australian responses to the WIPO Digital Copyright Treaty’ [2000] *EIPR* 214, 224.

taken by the courts and highlight the different levels of protection available. It is also clear that the protection given to TPMs has been extended beyond the protection given to copyrights, restricting uses that in the past have been considered legitimate.

The differences in the application of TPM provisions that are developing make it difficult for copyright owners to protect material globally where TPMs may be legislatively supported in some jurisdictions and not in others.

WIPO Treaties and TPMs

It is useful to first consider the history of legal protection for TPMs. The starting point is the *WIPO Copyright Treaty* and the *WIPO Performances and Phonograms Treaty* (the WIPO Treaties), both signed in December 1996. The WIPO Treaties came into force in early 2002 having been ratified by the requisite number of countries.

The WIPO Treaties 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 in connection with the exercise of their rights under [the relevant 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.⁴

The key elements of this provision are as follows:

- TPMs are required to be 'effective'. What is 'effective' is not clear from the WIPO Treaties. The United States legislation and the proposed United Kingdom legislation give some guidance, as does the case law. The Australian legislators opted not to use the term.
- TPMs will only be protected when used in connection with the exercise of copyright rights. TPMs protecting data not protected under copyright law or

³ P Sirinelli, *The scope of the prohibition of circumvention of technological measures: exceptions* <www.law.columbia.edu/conferences/2001/reports> 5.

⁴ *WIPO Copyright Treaty* art 11; *WIPO Performances and Phonograms Treaty* art 18.

protecting works that are in the public domain will not benefit from the anti-circumvention provisions.⁵

- TPMs must also restrict acts that are protected by copyright. Only circumvention for infringing purposes is prohibited.⁶

Since there is no detailed definition of TPMs, national legislators have freedom in their [43] implementation of the WIPO Treaties, provided a sufficient level of protection is given.⁷ Four main issues that could be covered by TPM provisions are apparent. These are whether or not the provisions will:

- prohibit the act of circumvention;
- prohibit the making, selling, marketing or other acts in relation to a circumvention device;
- protect TPMs that restrict access to copyright works; and
- protect TPMs that restrict or limit the use to which copyright works may be put.

However, the distinction between each type of protection can become blurred where technologies are combined. This is illustrated by the legislation and cases in each jurisdiction to be discussed.

Australia

Kabushiki Kaisha Sony Computer Entertainment v Stevens

TPM provisions were introduced into the *Copyright Act 1968* (Cth) by the *Copyright Amendment (Digital Agenda) Act 2000* (Cth) (DAA), which commenced on 4 March 2001. The DAA provisions were recently considered in *Kabushiki Kaisha Sony Computer Entertainment v Stevens*,⁸ where Sony was unsuccessful despite the introduction of the DAA. The case focussed on PlayStation games and console, described as ‘a video apparatus featuring a deck, a control and software designed for the playing of CD-ROMs’.⁹

⁵ J de Werra, *The legal system of technological protection measures under the WIPO treaties, the Digital Millennium Copyright Act, the European Directives and other national laws (Japan, Australia)*, <www.law.columbia.edu/conferences/2001/reports> 11.

⁶ *Ibid* 12.

⁷ *Ibid* 9.

⁸ [2002] FCA 906 (unreported, Sackville J, 26 July 2002). Sony has appealed the decision.

⁹ *Ibid* 10.

The PlayStation software incorporates an access code designed to be read by a boot ROM located within the console. Two other important features of the access code are that it cannot be reproduced by conventional CD recording or copying devices and that it varies from country to country so that, for example, a United States PlayStation game cannot ordinarily be played on an Australian console.¹⁰ If the access code is not present or cannot be recognised, the CD-ROM cannot be played. This method was designed to ensure that authorised games only were played on PlayStation consoles.

Technology, known as 'mod chips', exists which enable CD-ROMs that do not contain an access code, or that contain an access code relevant to another country, to be played on any PlayStation console. The mod chips work by instructing the console that the access and territorial codes exist when they do not.¹¹

The evidence in *Stevens* showed that the Defendant had supplied and installed mod chips and sold or supplied unauthorised copies of PlayStation games. The unauthorised copies of the games could be played only on a console that had been modified with a mod chip.¹² In Australia the act of circumventing a TPM is not prohibited however the manufacture and commercial supply of circumvention devices is covered by the DAA.

The key issue for the Court to consider was whether the protective method, that is the access code and/or the boot ROM, was a TPM within the meaning of the DAA. A TPM is defined as device designed in the ordinary course of operation to prevent or inhibit infringement of copyright by:

- ensuring access is only by access code; or
- a copy control mechanism.¹³

A question to be answered by the Court was whether the definition of TPM is satisfied where the device has the practical effect of deterring or discouraging infringement of copyright. The Court inferred that the access code did have this effect

¹⁰ Ibid 11.

¹¹ Ibid 12.

¹² Ibid 12.

¹³ *Copyright Act 1968* (Cth) s 10.

but came to the view that the definition of TPM required the relevant measure to provide something more than deterrence.

It was held that the definition of TPM is confined to devices that prevent specific actions which would [44] otherwise infringe or facilitate infringement of copyright in the protected work.¹⁴ The term 'inhibit' could not be equated with 'deter' or 'hinder', rather it equates to limiting, for example, the extent of copying of a work.¹⁵ The fact that the access code is not reproduced when a copy of the game is made, is merely a deterrent to copying and does not prevent it.

Sony argued that a copy of a pirated game was made in the console's Random Access Memory (RAM), thereby infringing its copyright. The access code therefore prevented or inhibited this type of infringement because unauthorised games could not be loaded. However, the Court found that only a very small proportion of the game's computer program is stored in the RAM at any given time.¹⁶ Reference was made to the recent decision of *Warner* which decided that playing a DVD on a DVD player does not make a reproduction in a material form of the software on the DVD because that data is only momentarily held in RAM.¹⁷

The Court in *Stevens* took the view that a reproduction of a work in an electronic form of storage constitutes an infringement only if the form of storage is itself amenable to further reproduction.¹⁸ As the game could not be reproduced from the data stored in RAM, it followed that the data stored in RAM was not a reproduction of the game.¹⁹

It is clear that the Court did not support the ability for a copyright owner to use a TPM to prevent use of a copyright work unless that use breached copyright. As there was no copying in loading an unauthorised game into a 'chipped' console, the access code did not constitute a TPM as it did not prevent or inhibit any copyright infringement.

¹⁴ [2002] FCA 906 (unreported, Sackville J, 26 July 2002) 22.

¹⁵ *Ibid* 23.

¹⁶ *Ibid* 24.

¹⁷ *Australian Video Retailers Association Ltd v Warner Home Video Pty Ltd* (2001) 52 IPR 242.

¹⁸ [2002] FCA 906 (unreported, Sackville J, 26 July 2002) 29, citing Copyright Law Review Committee, Parliament of Australia, *Computer Software Protection* (1995).

¹⁹ [2002] FCA 906 (unreported, Sackville J, 26 July 2002) 27.

The infringing acts of later copying an unauthorised game were not relevant to the function of the access code.

Interestingly, the Court did find that had the access code constituted a TPM then the mod chips would have fallen within the definition of circumvention device;²⁰ a 'circumvention device' is defined as a device with limited commercial use except the circumvention of an [effective] technological protection measure.²¹ The Australian Competition and Consumer Commission, which appeared as amicus curiae, argued that a device must have as its sole purpose or objective the prevention or inhibition of the infringement of copyright for it to qualify as a TPM.²² The court rejected this argument, citing the United Kingdom case *Sony Computer Entertainment v Owen*²³ discussed below.

Responses to the Stevens decision

It is questionable whether the decision in *Stevens* reflects the purpose and spirit of the DAA. One response to the decision is that the storing of images in RAM, whilst not a reproduction of a substantial part of the aggregate of images, is a reproduction of each of the individual images — each an artistic work.²⁴ An analogous view has recently been taken up by the Full Federal Court in the 'Panel' case, where [45] it was decided that each broadcasted image constitutes a separate broadcast, and each image is therefore protected by copyright.²⁵

A second response to the *Stevens* decision is that there is nothing in the DAA that requires the prevention or inhibition of copyright to be caused by the TPM itself. One of the purposes of Sony's access code was to address video game piracy and it did this

²⁰ *Ibid* 33.

²¹ *Copyright Act 1968* (Cth) s 10. Legislation has been introduced, but not yet passed, which would remove the word 'effective' from the definition: *Copyright Amendment (Parallel Importation) Bill 2002* (Cth), Sch 3, cl 1.

²² [2002] FCA 906 (unreported, Sackville J, 26 July 2002) 20.

²³ [2002] EWHC 45 (ChD).

²⁴ Freehills, 'Federal Court permits "chipping" of Sony PlayStation to continue unhindered', (31 July 2002) <www.freehills.com.au>.

²⁵ *TCN Channel Nine Pty Ltd v Network Ten Pty Limited* [2002] FCAFC 146 (unreported, Sundberg, Finkelstein and Hely JJ, 22 May 2002).

by ‘inhibiting’, that is, placing obstacles in the path of, would be copiers of the game.²⁶

The *Stevens* decision does seem incongruous particularly given the court in *Owen* (on the same facts), did not find the concept of copying the game into RAM as critical, or even an issue.

United Kingdom

Sony Computer Entertainment v Owen

The decision in *Owen* predated *Stevens* by six months. The facts are largely the same, however the relevant United Kingdom legislative provisions are different to that in Australia. The High Court of Justice came to a different view in *Owen* and Sony was successful.

The *Owen* judgment contains a number of decisive statements but with little explanation of the reasoning supporting those statements. The Court first confirmed the fact that ‘if you take a PlayStation game on a disc and copy it using a CD burner, the copy will not run on a PlayStation console’.²⁷ The Court then stated ‘it is fair to say that the copy which you make is impaired. These specially embedded codes are intended ... to prevent copying of Sony games.’²⁸

The alleged circumvention device, known as Messiah, operated in the same way as a mod chip. The Court found that this device was a device ‘specifically designed’²⁹ to circumvent a form of copy-protection regardless of the fact that Messiah could be used for non-infringing purposes.³⁰ The Court reviewed the potential non-infringing uses but found that most uses were infringing. However, one commentator has argued that on a literal interpretation the Court could be seen to give Sony carte blanche to tie users of PlayStation to Sony games so long as the ability to control users lies in a mechanism that prevents copying.³¹

²⁶ Deacons, ‘Chipping away at copyright ... the PlayStation case’ (19 August 2002) <www.deacons.com.au>.

²⁷ [2002] EWHC 45 (ChD) 2.

²⁸ Ibid 3.

²⁹ *Copyright, Designs and Patents Act 1988* (UK) s 296(2).

³⁰ [2002] EWHC 45 (ChD) 7.

³¹ J Irvine, ‘Playstation and the Messiah’ (28 June 2002) <www.twobirds.com>.

Currently the anti-circumvention provisions in the UK apply to the furnishing of information or devices that enable the circumvention of 'copy-protection' measures, but does not prohibit the act of circumvention itself. Nor is the circumvention of an access code prohibited.

A copy-protection measure is one intended to prevent or restrict copying of the work or to impair the quality of the copies made.³² This is to be compared with the DAA wording: a device designed in ordinary course of operation to prevent or inhibit infringement of copyright. There is a similarity in that both provisions relate to the prevention of copying of the work, such copying being one method of infringement of copyright. The UK provision also sets out a lower threshold for infringing the copy-protection provision by referring to the mere impairment of the quality of the copies made. As stated above, the fact that the access code is not transferred to a copied disc falls within the definition of 'impairment'.

However the Court considered that the higher threshold was satisfied, finding that there was no doubt that the access codes were devices intended to prevent or restrict copying of a work. The Court stated, [46] without providing any reasoning, that the 'copying that is prevented is, of course, the loading of the game into the computer.'³³

The decision in *Stevens* is clearly at odds with this conclusion, however as the Court in *Stevens* did not refer to the *Owen* decision on this point, it is difficult to gain an understanding as to where the differences lie. In *Stevens*, the Court was clear that if Sony designed its console software so that the portion of the program stored in the RAM could be reproduced — meaning that the game was copied into RAM — then the DAA would apply. The outcome of the two Sony cases seems to be purely based on whether there was a copying of the game into RAM on loading. It is curious that protection will only be afforded based on the technological operation of the means for using the work, rather than the operation of the TPM.

³² *Copyright, Designs and Patents Act 1988* (UK) s 296(4).

³³ [2002] EWHC 45 (ChD) 5.

Proposed UK legislation

The United Kingdom Copyright Directorate has announced proposed amendments to the TPM provisions, in order to ensure compliance with the relevant European Directive.³⁴ The proposed legislation has been criticised, principally in relation to the limited exceptions permitting circumvention that will be available.³⁵

The new provisions introduce the concept of effective 'technological measures' — defined as technology which is intended in the normal course of its operation to protect a copyright work other than a computer program.³⁶ Technological measures will be effective where use of the work is controlled through an access control or copy control mechanism. Query whether a difference would exist with the Australian position following the introduction of the new provisions. The requirement in the United Kingdom that the technological measure be intended to protect a copyright work must be read to refer to a measure that protects a copyright work *from infringement*. This is analogous to the Australian provisions.

The other major change is to introduce a civil remedy against a person carrying out the actual act of circumvention, bringing the UK in line with the US and leaving Australia without this particular action.

United States

In response to the WIPO Treaties, the United States enacted the *Digital Millennium Copyright Act* (DMCA) in 1998. The DMCA also makes a distinction between access and use control protection measures. However, the DMCA has indirectly created a new 'right of access' by prohibiting the circumvention of a technological measure that effectively controls access to a protected work.³⁷

The trafficking in a technology or product that is primarily designed or produced for the purpose of circumventing a technological measure that effectively protects a right

³⁴ 'EC Directive 2001/29/EC on the Harmonisation of Certain Aspects of the Copyright and Related Rights in Information Society: Consultation Paper on Implementation of the Directive in the United Kingdom' (7 August 2002).

³⁵ J Midgley, 'Critique of the proposed United Kingdom implementation of the EU Copyright Directive' (21 August 2002) <<http://uk.eurorights.org>>

³⁶ Proposed s 296ZD. The existing s 296 would be amended so that it applies to computer programs only.

of a copyright owner is also prohibited,³⁸ for example, the exclusive right to make copies of a work.³⁹

Universal City Studios Inc v Reimerdes

The relevant provisions of the DMCA in relation to access controls were considered in *Universal City [47] Studios Inc v Reimerdes*,⁴⁰ although much of the decision focuses on the constitutional validity of the DMCA. The plaintiffs were eight major motion picture studios who distributed many of their films for home use on DVD, containing the films in digital form. The DVDs were protected by an encryption system known as CSS. This technology ensures that DVDs may be viewed only on DVD players equipped with licensed technology that permits the devices to decrypt and play, but not to copy.⁴¹

Following the introduction of CSS, 'computer hackers'⁴² devised a program called DeCSS, capable of decrypting encrypted DVDs and allowing playback of films on non-compliant players as well as the copying of decrypted files to computer hard drives.⁴³ DeCSS was then posted on the Internet and the defendants subsequently posted DeCSS on their website, as well as providing links from that site to other sites where it could be obtained. There was no claim that the defendants had used DeCSS themselves to bypass any TPMs.

Under the DMCA trafficking provisions, liability depends on whether the technological measure 'effectively' controls access or protects rights. 'Effectiveness' is tested in terms of the ordinary operation of the TPM.⁴⁴ The Court looked at the meaning of 'effectively control' and noted that a person could not gain access to a CSS-protected work on a DVD without the application of the relevant keys, obtained under licence.⁴⁵ Reference was made to the decision in *RealNetworks Inc v Streambox*

³⁷ DMCA §1201(a)(1) and see de Werra, above n 5, 14.

³⁸ DMCA §1201(b)(1). DMCA §1201(a)(2) relates to trafficking in devices designed to circumvent access controls.

³⁹ DMCA §106(a).

⁴⁰ 111 F Supp.2d 346 (2000), available at <www.2600.com>.

⁴¹ *Ibid* 1.

⁴² *Ibid* 1, including Jon Johansen, a Norwegian teenager.

⁴³ *Ibid* 18.

⁴⁴ DMCA §1201(a)(3)(B) and §1201(b)(2)(B).

⁴⁵ 111 F Supp 2d 346 (2000) 32.

*Inc*⁴⁶ and the claim in both cases that if the TPM could be circumvented, then it could not be said to be 'effective'. The Court in *Reimerdes* noted that to be effective, the TPM need not provide a strong means of protection and found that CSS, in the ordinary course of its operation, without the use of DeCSS 'actually works' to prevent access to the protect work.⁴⁷ It therefore effectively controlled access.⁴⁸ This reasoning is likely to become relevant in the interpretation of the proposed UK provisions.

The Court next looked at whether DeCSS was designed primarily to circumvent CSS and what relevance this fact had on interpreting the trafficking prohibitions contained in the DMCA. The Court came to the conclusion that the offering of DeCSS was the prohibited conduct and that it was prohibited irrespective of why the program was written.⁴⁹ This approach is consistent with the approach taken in Australia and the UK.

The unanswered question raised in *Stevens*, as to the application of the DAA provisions where a device was primarily designed for non-infringing purposes but could be used otherwise, is dealt with in greater detail in the DMCA's three limb trafficking prohibition.⁵⁰ Whilst the first limb refers to technology that is primarily designed or produced for the purpose of circumvention, thereby raising the issue of 'why' the relevant technology was written, the other limbs focus on the use of the relevant technology. These limbs cover the situations where the circumvention technology has only limited commercial purpose or use other than circumvention⁵¹ or where the technology is marketed by a person knowing it will be used [48] for circumvention.⁵²

In *Reimerdes*, the defendants, not being the writers of DeCSS, still fell foul of the second two limbs of the prohibition by enabling DeCSS to be accessed via their website where it could be downloaded directly or downloaded from other sites:

⁴⁶ (2000) US Dist Lexis 1889, available at <www.law.uh.edu>.

⁴⁷ 111 F Supp.2d 346 (2000) 32.

⁴⁸ *Ibid* 33.

⁴⁹ *Ibid* 36.

⁵⁰ DMCA §1201(b)(1).

⁵¹ DMCA §1201(b)(1)(B).

⁵² DMCA §1201(b)(1)(C).

- automatically on the creation of the link;
- where it was presented with no other content, ready to download; and
- where it was presented along with other content, on the basis that the defendants had encouraged others to post DeCSS and to inform the defendants that they were doing so, so that a link could be created.⁵³

The *Reimerdes* decision was upheld on appeal.⁵⁴

The US provisions are broader than those in the UK and Australia. Circumvention of access controls is clearly prohibited, regardless of whether those access controls prevent an infringement of copyright. Unless an exception in the DMCA applies to permit circumvention, a user is required to deal with the copyright owner each time the work is accessed. Commentators fear that many copyright works could become available only on a pay-per-use basis as any applicability of the fair use doctrine in the United States does not ensure fair access to the work in the first instance.⁵⁵

Application of the decisions

The challenges digital technologies present to existing copyright laws and the issues that arise in applying these decisions are best illustrated by looking at new protection technologies on the market.

Protection of audio CDs

Audio CDs have recently been protected by measures which prevent a computer from copying songs onto a hard drive.⁵⁶ In each jurisdiction, it is apparent that these measures would be considered TPMs as:

- in Australia, an infringement of copyright is prevented by a copy-control mechanism;
- in the United Kingdom, the measure is intended to prevent or restrict copying; and

⁵³ 111 F Supp 2d 346 (2000) 49.

⁵⁴ Court of Appeals for the Second Circuit (28 November 2001) <www.eff.org>.

⁵⁵ D Petteys, 'The freedom to link? The Digital Millennium Copyright Act implicates the First Amendment in *Universal City Studios, Inc v Reimerdes*', 25 *Seattle University Law Review* 287, 314; E Young, 'Universal City Studios, Inc v Reimerdes: Promoting the progress of science and the useful arts by demoting the progress of science and the useful arts?' 22 *North Kentucky Law Review* 847, 871.

⁵⁶ 'JVC creates "uncopyable" CD-ROM' (30 August 2002) <www.zdnet.com.au>.

- in the United States, the measure would effectively protect a right of a copyright owner in a work.

Some of these measures have been easily circumvented by the use of a felt-tip marker.⁵⁷ However a marker would not be considered a ‘circumvention device’ as it is not a device with limited commercial use other than circumvention (Australia), a device specifically designed for circumvention (United Kingdom) or a device that falls within any of the three limbs in the United States provisions.

It appears that some copyright owners are choosing to fight this kind of response by introducing more basic protection measures, such as gluing audio CDs into CD players when distributing yet to be released material to the press.⁵⁸ This seemingly ‘low tech’ method is ingenious as it avoids the need to rely on the apparent vagaries of the TPM provisions.

[49] *Protection of CD ROMs*

Somewhat more ‘high tech’ is a technology which encrypts the contents of a CD ROM so that it cannot be read without a ‘key’, also placed on the disc. However, while the key can be read by any CD ROM drive, the key cannot be written by a CD-R/RW drive⁵⁹ so a copied version is unreadable.⁶⁰

In Australia, the question would be: does the fact that the copied version is unreadable mean that the technology has ‘prevented or inhibited’ the infringement of copyright? It could be argued that the technology preventing the copying of the key has ‘prevented or inhibited’ the infringement of copyright by preventing or inhibiting the copying process. However other views are open on the reasoning in *Stevens*. The fact a copied version may exist, albeit unreadable, could be the basis for arguing that copying is not prevented or inhibited but that access only is prevented. Alternatively, the unreadable nature of the key could be merely a deterrent to copying. The technological operation of the measure would be at issue, as it was in *Stevens*.

⁵⁷ ‘Cheap pen cracks “copy-proof” CD’ (21 May 2002) <www.zdnet.com.au>.

⁵⁸ C Willman, ‘What will those crazy record labels do next?’ (17 October 2002) <www.cnn.com>.

⁵⁹ A CD-R/RW drive can read any type of CD and allows for copying of content, see What is?com <www.whatis.com>.

⁶⁰ Above n 56.

Under the current UK provisions the key technology would be caught as, at a minimum, the technology 'impairs' the quality of the copies made and therefore is a form of copy-protection which is itself protected. It remains to be seen how the proposed provisions will be interpreted and whether the largely unreasoned and avidly pro copyright owner decision in *Owen* will be followed over the more conservative approach taken in *Stevens*.

While the decision in *Reimerdes* did not make any clear pronouncement on the operation of the provisions that protect 'a right of a copyright owner', focussing as it did on the access control provisions, the plaintiffs did rely on these 'rights' provisions.⁶¹ It appears that the plaintiffs were successful since the Court notes that certain defences relied on by the defendants were not available in response to an action under those provisions.⁶² Again it is likely from the tone of the *Reimerdes* judgment that a court would consider the circumvention of the key technology discussed above as falling within the DMCA.

Possible exceptions

The other major differences in each jurisdiction come from the operation of distinct exception provisions. On appeal in *Reimerdes*, the Court considered a provision in the DMCA which provides that nothing in the legislation affects the rights or defences to copyright infringement including fair use.⁶³ The appellants argued that this provision could be read to allow the circumvention of TPMs when the material will be put to fair use, exempt from copyright liability. The Court rejected this argument, stating that the provision ensured fair use could be made of material even though the information was obtained in an illegal manner.⁶⁴ That is, the use to which the material is put after it is obtained using a circumvention device has no relevance to the prohibition on trafficking in circumvention technology.

⁶¹ 111F Supp 2d 346 (2000) 30.

⁶² 111F Supp 2d 346 (2000) 44

⁶³ DMCA §1201(c)(1).

⁶⁴ *Reimerdes* Court of Appeals for the Second Circuit (28 November 2001) 11.

Public comment on providing specific examples of where the DMCA's restrictions cause problems in the marketplace has recently been sought, and it is likely that the issue of fair use will be considered.⁶⁵

In Australia, the DAA provisions allow for a circumvention device to be used for a 'permitted purpose',⁶⁶ limited essentially to educational and governmental use. The concept of fair dealing, which is limited in any event,⁶⁷ is not considered to be a permitted purpose.

[50] Under the proposed provisions in the UK, circumvention does not appear to be permitted under any circumstances. Instead, where a person who is prevented from benefiting from certain provisions contained in the European Directive, such as for teaching or scientific purposes, the person may issue a notice of complaint to the Secretary of State. A copyright owner may then be given a direction by the Secretary of State to enable the person to benefit from those provisions.⁶⁸ As one commentator has asked: 'Would anyone bother complaining?'⁶⁹ It is highly likely that in the absence of immediately available exceptions, users will not follow legitimate channels and devise or acquire mechanisms to enable the use of works when required.

Conclusion

The US and its courts have embraced the opportunity given by the WIPO Treaties and created extensive protection for TPMs that protect rights of copyright owners as well as processes that control access to works. Australia has taken a stricter approach both in terms of legislation and its interpretation, limiting protection for TPMs to those that actually prevent copyright infringement rather than those which may simply deter infringement. The UK currently takes the middle ground with its legislation protecting TPMs that merely impair the quality of unauthorised copies and its courts enthusiastically applying the provisions in support of copyright owners. However, proposed legislation in the UK is set to more closely align with the Australian provisions.

⁶⁵ J Borland, 'Anti-hacking copyright law to get review' (11 October 2002) <www.cnet.com>.

⁶⁶ *Copyright Act 1968* (Cth) s 116A(4).

⁶⁷ See, eg, *Copyright Act 1968* (Cth) ss 40–42.

⁶⁸ *Copyright, Designs and Patents Act 1988* (UK) Annexure A, 5.2, 35

⁶⁹ A Perrett, 'When users lose out' 20 August 2002 <www.spiked-online.com>.

The main difference between the jurisdictions in the future may well be in the disparate protection granted to access controls. While a new right of access has effectively been recognised as a copyright in the US,⁷⁰ the DAA and the UK provisions appear to have been designed to avoid this result. Circumvention of an access TPM is only relevant when the TPM seeks to protect an existing copyright, not access to the work itself. While some commentators consider that the Australian provisions are more in favour of copyright users,⁷¹ it may be the DAA and the UK provisions are simply an accurate reflection of existing copyright owners rights, rather than any sort of compromise between users and owners.

Each jurisdiction has implemented the spirit of the WIPO Treaties in a different manner, however in doing so they have created the potential for differing interpretations by their courts. Rather than making certain the ability for copyright owners to protect material globally, the same factual circumstances have lead to different results due to differing judicial understanding of technology. Further uncertainty exists due to the creation of new rights in some jurisdictions and the imposition on traditionally 'legitimate' use of copyright works. It remains to be seen what attitude courts and the legislatures will take in the future to ensure that copyright owners are effectively protected across the board without diminishing the ability of others to access and use copyright material.

⁷⁰ Sirinelli, above n 3, 5.

⁷¹ Fitzpatrick, above n 2, 22.