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ARTICLES

What can it mean "to prevent or inhibit the infringement of copyright"? – A critique on Stevens v Sony – *David J Brennan*

In the 2005 decision *Stevens v Sony* (2005) 79 ALJR 1850; 221 ALR 448, the High Court unanimously found (overturning a unanimous Full Federal Court) that Sony PlayStation technology which precluded the use of unauthorised game discs was not protectable under Australia's anti-circumvention regime. This outcome was reached on the basis that Sony's technology did not "prevent or inhibit the infringement of copyright", as required by the terms of the statutory definition. A reason for interpreting the definition so narrowly included that "it is important to avoid an overbroad construction which would extend the copyright monopoly rather than match it". This article is a critical evaluation of the High Court's reasoning. It argues that the outcome arrived at by the High Court may be inconsistent with the objective purpose of the provision, fails to deal adequately with an analysis of Justice French in the Full Federal Court and more broadly reflects the undesirable fashion of copyright scepticism. 81

Search and ye shall infringe? Current issues concerning the use and abuse of trade marks in cyberspace – *Jani McCutcheon*

This article examines the legal ramifications of certain internet practices that impact on the rights of trade mark owners. Specifically, the article considers the interface between Australian trade mark law and third party appropriation of others' trade marks through key word advertising and metatags. The article explores whether Australian trade mark law does or should place any restraints on such conduct. Ultimately, the article argues that the current Australian law is poorly designed to protect the rights of Australian trade mark owners against such trade mark interception in cyberspace. 99

Technological protection measures – the problem of "access to a work" – *Gerald Ng*

The definition of "technological protection measure" in the *Copyright Act 1968* (Cth) contemplates that such measures may take the form either of access control measures or of copy control mechanisms. That definition was recently construed by the High Court in *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 79 ALJR 1850; 221 ALR 448, a case which left unanswered the question of what is meant, in relation to an access control measure, by the term "access". With reference to the facts in *Stevens v Sony*, this article considers both the question thus posed and its significance in light of changes made to Australia's copyright regime by the *US Free Trade Agreement Implementation Act 2004* (Cth). 114

Non-literal patent infringement: More honoured in the breach than the observance? – *Richard R L Hoad*

One issue which has received considerable judicial attention but limited academic analysis in recent years is the proper approach to the assessment of patent infringement under Australian law. Often it is unclear whether an allegedly infringing product or process falls within a given claim of the patent in suit. Where the alleged infringement does not clearly fall within the literal terms of the claim, the patentee will inevitably argue that the claim should not be confined to those literal boundaries.

This article traces the development of the approach taken by courts in Australia (and, where relevant, England) to this issue of "non-literal infringement". The principal decisions are analysed in order to chart the development of the law in this area. It is argued that, despite some confusion amongst judges and commentators, the law in this area has been relatively settled in Australia for some time. It is no longer helpful – indeed, it is confusing – to refer to the "pith and marrow" or "substance" of an invention. Those doctrines as traditionally understood no longer exist. The words of the claim are cardinal and the search for the "substance" of the claim begins and ends with the essential integers. 121

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